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THE STRANGE CAREER OF JUDAH P. BENJAMIN*

By LAURIE H. RIGGS
Member of the Baltimore Bar

When George G. Vest of Missouri entered the United States Senate shortly after the Civil War, he asked Dennis Murphy, official reporter of the Senate for forty years, a remarkably well-informed lawyer of considerable ability, who in his opinion, was the ablest and best-qualified senator he had known during his years of service. Murphy replied, "Judah P. Benjamin of Louisiana, by all odds."

Senator Vest, who knew all the public men of his own day, declared that he had never known Benjamin's equal as an accomplished, well-equipped, ready debater and legislator.

To the life of this remarkable man, whose transcendent ability was supplemented by a wonderful personality and unusual capacity for work, I invite your attention.

The career of Judah P. Benjamin, is, as far as I am able to judge, without parallel in the annals of history. While it cannot be said of him as of Mazeppa, that bound and naked, bleeding and alone, he passed from a desert to a throne, it can be truthfully related that he, a fugitive and an outcast, crossed the ocean to become the first lawyer in England and the leader of the most aristocratic and exclusive bar in the world.

This phenomenal success was achieved by a man who was both a Jew and a stranger, who had not practiced his profession where the common law of England prevailed, but had risen to eminence as a lawyer in Louisiana, the only state in the Union where the civil law had been adopted. But that is only a part of the career of this remarkable man, through the romance of whose life there runs a minor strain of disaster and adversity, which from the earliest dawn of history seems to have been the fortune of the Jew.

Were one of our novelists to take as his hero a penniless emigrant lad, have him surmount difficulties in early life and become a successful American lawyer, have him gain a fortune and acquire a fine estate, only to lose them through flood and the endorsement of a note for a friend; by dint of hard work to acquire another fortune; support two families, a wife and daughter in Paris and a mother and sisters in America; and then have him achieve national fame under one flag, international renown under another, splendid distinction under a third; and have him die at a ripe old age, domiciled under a fourth: not a few readers would feel that the law of probabilities had been violated. If, in addition to this, he made that hero a scion of that remarkable people whose history, as

* Address delivered before the Barristers' Club of Baltimore, October 25, 1938. Reprinted from THE DAILY RECORD by permission. Editor's note.

George Eliot says: "is a national tragedy lasting for fifteen hundred years," and had him conquer in the most aristocratic of cities, not merely the obstacles of rank and of fortune, but that sterner, almost impassable barrier of race prejudice, and marry the beautiful and charming daughter of one of its first families; become a successful practitioner before the Supreme Court, with an income of $75,000 a year; organize with others two railroads; enter politics and become a United States senator: reviewers would think that they should point out that even fiction has its limits. But, should this bold novelist dare to slip in a chapter or two, making his hero one of the central figures of a great war in which he lost everything; and a little later, a proscribed rebel in the land he loved so dearly; have him make a leisurely escape through a country swarming with watchful enemies, and after getting him to seeming safety, first shipwreck him and have him picked up at open sea, and finally let him reach his destination with the vessel in flames, scarcely able to reach the harbor in safety, and have him within a year lose almost all his money: preposterous, impossible and absurd would doubtless be mild expressions of critical wrath. If this novelist, as a climax to this incredible story, should have his hero commence at fifty-five the study of law as any youth might; become an English barrister-at-law, surviving the worry and starving process of building up a practice at the bar of England (meantime eking out a living by writing for the press); have him gradually succeed; write a notable work on Sales; become so successful at sixty that he is making $10,000 a year, at seventy-one over $70,000; build a magnificent home in Paris for his wife and daughter; become Queen's Counsel; and in sixteen years, past the meridian of life, have him in addition "achieve at the English Bar more than most men can achieve in a lifetime"; and on retiring at the age of seventy-two have him banqueted by two hundred and fifty of England's highest judicial officers, from the Lord High Chancellor and the Lord Chief Justice down: yet, such would be but a few high lights taken from the career of Judah P. Benjamin, lawyer, orator, and statesman; a senator of one Republic, a cabinet minister of another, and a distinguished leader of the bar of a country to which he transferred his allegiance after the fiftieth milestone of his life had been passed.

This extraordinary man, whose life reads like the most impossible of romances, was born on the Island of St. Thomas on May 6, 1811. It chanced that Benjamin was born a British subject, and according to the law of England, that fixed his status for life, so that when many years later he sought her friendly shores, he came not as an alien, but as a citizen.

In 1818 he was brought by his father to Wilmington, North Carolina, and sent to a well-known school at Fayetteville. It is said that he showed remarkable talent in his early years. In 1827 he entered Yale University, and splendidly distinguished himself there, both as a popular student and as a prize winner, standing at the head of his class. His means were so meager that he left Yale in his sophomore year. Soon afterwards he went to New Orleans, taking any occupation he could find. He became a

private tutor and a clerk in a notarial office, giving the Creoles lessons in English, and himself studying French and Spanish and also taking a course in law. He was admitted to the bar in 1832 at the age of twenty-one. The next year he married a beautiful young French Creole who had been his pupil. His wife was a devout Roman Catholic, and a member of one of the leading families in New Orleans.

During the first years of his practice, he found time to prepare for his own use a digest of the decisions of the late territory of Orleans, and of the Supreme Court of Louisiana, which was the earliest digest of the Louisiana decisions. He, with Thomas Sliddell, edited it for publication in 1834. This was Benjamin's work; it received instant recognition, and like everything he did, was remarkable for simplicity and lucidity of method and presentation.

With a wonderful facility in acquiring knowledge, and a special talent for languages, he perfected himself in French and Spanish, and made himself familiar with the legal system which prevailed in what had so recently been French or Spanish territory. Thus equipped, he became, after ten years of prodigious labor at the bar, a recognized leader, especially in commercial law. He also prospered financially, bought a sugar plantation, and withdrew from the practice of law on account of his eyes, devoting his time to the raising of sugar in a scientific way.

His charming wife found life so "triste" on the plantation that when their only child was five years old, she went to Paris to educate her, and remained there the rest of her life. He continued to support them in luxurious style, and almost annually crossed the ocean to visit them. During a period of adversity in later years, Mrs. Benjamin replied to one of his letters cautioning her about expenses: "Don't talk to me about economy, it is so fatiguing."

After her departure, Mr. Benjamin brought his mother and his sisters to the plantation. Their stay there was not to be long, for the Mississippi went on a rampage, as it still does, and destroyed his growing crop. About the same time, Benjamin was called upon as an accommodation endorser to pay $60,000 for a friend. He was compelled to give up his plantation and move his family to less pretentious quarters.

His eyesight having improved, he returned to the practice of law, and soon became one of the leading lawyers of the United States. He was recognized as a consummate master of the art of stating his case. Indeed it may be said of him as of Calhoun, that his every statement was an argument, as is shown by the well-known story about his first appearance before the Supreme Court of the United States. Justice Fields said to Jeremiah Black, the adversary of Benjamin: "You had better look to your laurels, for that little Jew from New Orleans has stated your case out of Court."

In 1842 he first came into national prominence by his appearance in the celebrated case of the brig *Creole*.[1] He, with others, represented the insurance companies, and sued for the loss of slaves shipped from Norfolk, Virginia, to New Orleans. The policies covered all losses except those occurring by interference of foreign nations. While at sea the slaves mutinied, killed the mas-

[1] 2 MOORE, DIGEST OF INTERNATIONAL LAW (1906) 351, 358.

ter, and took the ship into a British port. The British authorities arrested the active mutineers, and while the ship was being held in port, many of the slaves made their way to land and became free upon British soil. Mr. Benjamin succeeded in showing that the slaves had gone ashore upon the advice of British authorities, and that this constituted the interference of a foreign nation, thereby bringing the loss within the exception of the policies.

One of his most interesting cases was *McDonogh's Executors* v. *Murdoch*,[2] in which he and Reverdy Johnson, representing the heirs at law, tried to break the McDonogh will by which enormous legacies were left to the cities of Baltimore and New Orleans. (The McDonogh School in Baltimore County owes its origin to the McDonogh legacy.) Though Benjamin was for the losing side, the Court noted the power and ability of his argument. Glowing press descriptions appeared at the time. The reporter for the *Washington Union* enthusiastically said: "Whoever was not in the Supreme Court room this morning missed hearing one of the finest forensic speakers in the United States. In the case of the great McDonogh Estate, Mr. Senator Benjamin made one of the most truly elegant and eloquent speeches that it was ever my good fortune to hear."

In 1860, the last year of his practice in the United States, he was engaged in California in litigation over quicksilver mines. The case was appealed, but the war intervening, he was necessarily absent and could not argue it. In 1863, when Benjamin was in Richmond as a member of the enemy Cabinet, his associates, A. S. Peachey, Reverdy Johnson, Charles O'Connor, and J. J. Crittenden, did him the signal honor of filing his brief before the Supreme Court of the United States.[3]

His legal talents became so generally recognized that President Pierce offered him the position of Associate Justice of the United States Supreme Court, but he preferred his activities at the bar and in politics. The effect which the acceptance of this offer might have had upon subsequent events may be made the subject of curious speculation. On the one hand, the war between the states might have ended much more quickly; and on the other, the legal literature of the United States might have been enriched by some masterly judgments, while the English bar would have been poorer.

It would make this paper too long to detail Mr. Benjamin's political activities. It is sufficient to say that he was a disciple of John C. Calhoun, a staunch advocate of the Southern views upon the Constitution and upon slavery. He argued that slaves were like any other property, and that their owner was entitled under the Constitution to have his property protected.

Mr. Benjamin was the first Jew ever to sit in the United States Senate, and one of the best-qualified men to occupy a seat in that august body. He took a leading part in the discussion of all questions leading up to the Civil War. He had the distinction of being elected to the Senate as a Whig, of changing his politics during his term, and being reelected as a Democrat. His farewell speech on leaving the Senate and defending the right of Louisiana to secede from the Union, with the dramatic close in which he said: "Traitors, treason, aye, sir, the people of the South imitate and glory

[2] 15 How. 367 (U. S. 1853).

[3] United States v. Castillero, 2 Black 17 (U. S. 1863).

in just such treason as glowed in the soul of Hampden. Just such treason as leaped in living flames from the impatient lips of Henry; just such treason as encircles with a sacred halo the undying name of Washington. . . . You may set our cities in flames. . . . You will never subjugate us. An enslaved and servile race you can never make us. No, never, never!" moved the Senate galleries to uncontrollable cheers, and is properly used as one of the finest examples of American oratory.

He cast his fortunes with the Confederacy, and was first Attorney-General, then Secretary of War until the Confederate reverses at Forts Henry and Donelson and Roanoke Island, for which he was unjustly blamed. Jefferson Davis, being in a position not only to know the true facts, but also to appreciate the value of Benjamin's services, raised him from Secretary of War to Secretary of State, a position he held until the end of the war. Until his entrance into the Confederate Cabinet, Benjamin had enjoyed great popularity, but after the Confederate reverses mentioned above, he became unpopular with the Confederate generals, and upon his advocacy of military service for the slaves, with their emancipation, he became unpopular with the Southern people who disagreed with him. Throughout, he was Jefferson Davis's most intimate and most influential adviser, and Davis kept him in office in spite of great opposition; Benjamin was called "the unprincipled minister of an unprincipled tyrant." He was known as the "brains of the Confederacy," and rendered indefatigable service in conjunction with the diplomatic activities of the Confederacy, although his efforts were not successful in persuading either France or England to take sides with the Confederacy.

During this time and later, he manifested amazing powers of endurance and maintained his cheerfulness in the midst of disaster. When the Confederacy collapsed, Benjamin was a man over fifty years of age, practically expatriated from the country to which he had originally been alien, with no land that was his, no people he could claim; apostate from his religion; married into a race with which he had nothing in common, and into a religion which was a bitter foe of the one which might have been his. Seemingly, his career was hopelessly wrecked. He was beyond the age at which most men can start again; well he might have lamented with the poet:

> And now I am all bereft
> As when some tower doth fall,
> With battlements and walls,
> And gate and hedge and all,
> And nothing left.

And yet his courage was undaunted. He declared that he would not be taken alive, preferring death in an attempt to escape to such captivity as awaited him if he became a prisoner.

No one knew better than he that of the leaders of the South, he was more obnoxious to the United States' authorities and their adherents in the South than President Davis himself, and he was certain that his enemies in the Confederacy would be swift to testify against him in order to satisfy their personal enmity.

Serene and cheerful, even in the gloom of disaster, Mr. Benjamin followed the retreat of the wrecked Government from Richmond. He was the life of the party, refusing to be depressed himself, or allowing others to be so, and yet he knew that he was a ruined man, with scarce

a hope of saving some little from the wreck of the second fortune he had built up by his own labors, and that he must begin life anew.

Upon hearing that General Johnson had surrendered and that amnesty had not been granted to the Executive Officers of the Confederate Government, he obtained the consent of President Davis to make his escape through Florida. He parted from Mr. Davis at Washington, Georgia, and knowing his journey to be a hazardous one, he disguised himself first as a Frenchman, and later as a farmer in search of land in Florida upon which to settle. Dressed in homespun clothes made by a farmer's kind wife, and mounted on a horse with the commonest and roughest equipment he could find, he journeyed as far as possible on byways, always passing around towns and keeping in the less inhabited districts. Finally he reached central Florida. He intended to make his escape from the east coast of Florida, but hearing that a boat was not to be had, and that the risk of detection would be great, he made his way to the Camble Mansion near Bradentown on the west coast of Florida, where he sought refuge and was welcomed as a fugitive in hiding from Northern troops. There was a secret chamber in the massive fireplace where Benjamin was hiding while Northern sympathizers visited the mansion seeking him. (This mansion is now the property of the state of Florida, as a memorial to Judah P. Benjamin.)

From there Benjamin went aboard Captain Fred Tresca's sloop "The Blond" (for even in those days gentlemen preferred blondes). In this small open boat, with no place to sleep, accompanied by two trusty companions, he set out on a six hundred mile journey to the Bimini Islands. Federal officers intercepted this party at Key West, where a federal blockade was established. When they went aboard, they found an old colored mammy preparing breakfast for her boys. This was Judah P. Benjamin.

He arrived at the Bimini Islands on July 10, 1865, believing that his risk of capture was at an end. He then sailed in a small sloop loaded with wet sponges bound for Nassau. When the sponges dried, they expanded and opened the seams of the boat, and it foundered at sea, sinking with such rapidity that the occupants hardly had time to jump into a small skiff which was in tow. There he was on the Atlantic Ocean, with one oar, a pot of rice, a small keg of water as supplies, and three negroes as his companions; in imminent disaster, only five inches of the boat out of water, on the broad ocean with the certainty of not being able to survive five minutes if the sea became the least rough. The sea remained calm, and they were picked up by His Britannic Majesty's lighthouse yacht "Georgia," and were treated kindly by Captain Stewart, who sailed out of his way to take Mr. Benjamin back to Bimini.

He then went to Nassau where he wrote his sister on July 22, 1865, giving an account of his journeys, and telling her, "I am contented and cheerful under all reverses, and only long to hear of the health and happiness of those I love." From Nassau he went to St. Thomas Island, where he visited the scenes of his early childhood.

Unbelievable as it may sound, his misfortunes were not at an end. He sailed in a few days for England. The ship caught fire and barely made the harbor

in safety. But flood and fire, and the dangers of the highways notwithstanding, at last he reached England safe from the ever detested Yankees, with but a scanty remnant of his fortune left him, to begin anew in a strange land.

Probably not until his foot touched English soil did Benjamin have time to pause and survey the wreck which the events of the last few years had wrought in his fortune. Proscribed, bankrupt, the noonday of his life long past, he had been forced to depart from the land of his adoption and achievement and seek in another not merely refuge, but opportunity as well. After he had carved success by years of exertion, now in his fifty-fifth year he was forced to begin his labors once more. Having been the architect of two fortunes, he was now compelled to commence the construction of a third, for the federal authorities had promptly confiscated his property and possessions. His friends managed to ransom his private library and send it to him; a testimonial of their regard which was not, we may feel certain, unappreciated. His law library, however, for which he probably would have been more grateful, was beyond redemption. The late Baron Pollock tells us that the only two injuries suffered by Benjamin at the hands of the Northerners, of which he spoke with anything like bitterness, was that they burned his law books and drank his Madeira. From this remark it is seen that even his resentment was tempered with his characteristic good humor.

In the midst of this general darkness there penetrated one ray of light, and we find Benjamin writing to the Bayards that he had been "lucky enough to receive one hundred bales of cotton that have escaped Yankee vigilance, and the price here is so high that it has given me nearly $20,000."

Fate, however, had a Parthian arrow still remaining in her quiver, and the greater portion of the money realized from this provident arrival was lost within the year by the failure of Overend and Gurney's Bank. The remainder went to the support of his wife and daughter residing in Paris.

Declining pecuniary assistance from such staunch friends as the Bayards of Delaware, he set to work to supply immediate needs for himself by writing for the daily papers. Refusing offers of other and easier modes of rebuilding his fortune, particularly from friends in France, he said that he would study for the English bar: "Nothing else appeals to me so much."

He realized that the fight for a living would probably be a hard one, but he was undaunted by present or prospective difficulties, smilingly resolute and self-reliant as he returned to the profession to which he was devoted, and which he resolved he would never quit again for any allurements of politics.

Notwithstanding the fact that he had declined a place on the highest Court of the United States, the regulation of the English bar offered him no escape from the customary years of study demanded of a legal novice. He was entered as a student at Lincoln's Inn, June 13, 1866. Aspirants read in the office of some eminent counsel. He was received in Charles Pollock's chambers, a fact which increased his financial responsibility. He was driven to newspaper work to help support himself. The editor of the *London Daily News* employed him as a

writer, particularly on international subjects.

There followed a unique recognition of his standing in the legal world, the action of the barristers of the Inn at Court in dispensing with the three-year rule, and calling him to the bar after less than five months as a student. Judge Kenesaw Mountain Landis says that Benjamin was the first American not a graduate of Oxford to be admitted to the English bar. He chose Liverpool for his legal efforts, and he hoped, not in vain either, to derive advantage from his former connections with the merchants of that great seaport.

Nevertheless, the first few years were almost as difficult for him as for the ordinary tyro just commencing to practice. Nothing, however, seemed to dishearten him. At the outset of his career in the United States, he had turned his leisure to profit by compiling a digest. He now imitated that example by writing his great work on the *Law of Sale* which was published in 1868. It became standard at once in spite of the fact that the author was still living. From the day of its appearance, business flowed in upon him.

His first case in the English courts was one which must have aroused his strongest sympathy. It was a suit brought by the United States Government against McRae,[4] ex-Agent for the Confederate States of America. The suit was to compel McRae to account to the United States Government for all funds and property which had come into his hands as Agent for the Confederacy. Benjamin, being a friend, was employed as junior counsel. The case proceeded to trial before the English Court of Chancery, Vice-Chancellor James sitting. After the plaintiff's counsel had closed, and Kay, leader for the defendant, had finished his argument, it was apparent that the Vice-Chancellor was about to send the case for an accounting and reserve it for future consideration, a decision obviously fatal to the defendant. Thereupon Mr. Benjamin, the junior for the defendant, without ceremony, rose and in a stentorian voice not in accord with the quiet tone usually prevailing in a Court of Chancery said: "Sir, notwithstanding the somewhat offhand and supercilious manner in which this case has been dealt with by my learned friend, Sir Roundell Palmer, and to some extent acquiesced in by my learned leader, Mr. Kay, if Sir, you will only listen to me (repeating the same words three times and on each occasion raising his voice) I pledge myself you will dismiss this suit with costs."

Whatever astonishment may have been occasioned in the Court did not restrain the newcomer, and he went on for three hours without stopping, stoutly insisting that the United States could not approbate and reprobate, that it could not take the benefits of the agency without assuming the liabilities. A crowd assembled to witness this most unusual scene. The suit was dismissed with costs and the decision affirmed on appeal.

Benjamin's dramatic entry and rise to leadership at the English bar, with shadowed fortune, with dependent wife and daughter in Paris, and dependent sister in New Orleans, at the age of fifty-five and recently admitted to the British bar, brings to mind another great advocate, Lord Erskine, who likewise poor and with a dependent family, defied the Court in his first argument, and when

[4] United States of America v. McRae, L. R. 3 Ch. App. 79 (1867).

asked how he had the temerity to do it, said: "I thought I felt my little children tugging at my coat and saying, 'Father, give us bread.'"

In 1872 his argument in *Rankin* v. *Potter*,[5] his first reported case in the House of Lords, so impressed Lord Chancellor Hatherly that the latter directed a patent of precedence to be issued to Benjamin, which virtually made him Queen's Counsel. He soon established himself in all courts as without a superior in appeal cases. He finally confined his practice to the House of Lords and the Judicial Committee of the Privy Council. Between 1878 and 1882 he appeared in no less than one hundred and thirty-six reported cases in these two tribunals, in every one of which he argued questions of great legal significance, affecting momentous financial interests.

Among these was the case of *Thomas Castro* v. *The Queen*,[6] in which he was leading counsel for the Tichbone claimant in the latter's fruitless appeal to the House of Lords from his conviction.

Perhaps the incident that is best remembered, or rather never forgotten in the English notices of Mr. Benjamin, occurred in the case of the *London & County Banking Co.* v. *Ratcliffe*,[7] on May 19, 1881. The case was on appeal to the House of Lords, and Mr. Benjamin, in his argument for the appellants, entered somewhat at length into the complicated facts of the case; and then, as was his custom, formulated in the most succinct style the propositions of law upon which he relied, and which it would be the purpose of his ensuing arguments to make good. On Mr. Benjamin's restating one of his propositions in slightly different terms, Lord Chancellor Selbourne remarked "Nonsense." The remark was made in an undertone, and was not intended to be heard. It, however, reached Mr. Benjamin's ear. With heightening color he proceeded to tie up his papers. This accomplished, he bowed gravely to the members of the House, saying: "That is my case, my Lords." He turned and left the House. He could not be induced to return. His junior was permitted to finish the argument, but Lord Selbourne, not content with a private apology, took advantage of the next hearing of the cause to express publicly from the woolsack his regret that he had used the offending phrase.

This little incident, as well it might, made a deep impression upon the profession in England. Thus on two historic occasions, when Benjamin was not accorded the civility and courtesy he thought was due: the one in the Senate of the United States (to be mentioned later), and the other in the House of Lords of Great Britain, we see him acting with a dignity and delicacy of action and a firmness of manner which must extort admiration from the most unwilling. Nor does the fact that at both times the other person hastened to make reparation, and afterwards became and remained his friend, tend to dim that sentiment. In almost any other life than that of Benjamin, the reception of a public apology from the President of one Government and the Lord Chancellor of another would assume the importance of an episode; in his it was a mere incident.

It was not long after this that Lord Selbourne was to unite heartily with the bench and bar of England in a farewell banquet to this illustrious advocate.

[5] L. R. 6 H. L. 83 (1873).
[6] 6 App. Cas. 229 (1881).
[7] 6 App. Cas. 722 (1881).

In 1880 Mr. Benjamin was injured by falling from a moving tram car in Paris. Although he never fully recovered from these injuries, he resumed his practice.

While he was in Paris with his wife and daughter at Christmas time in 1882, his infirmity so increased and took such an alarming turn, that his physician absolutely forbade the attempt to resume work.

Upon his announcement of his intention of retiring from the bar early in 1883, not only his brother barristers, but also the leading daily papers and the professional periodicals made his retirement a matter of national concern and regret such as no other member of the English bar had ever received. Furthermore, the bench and bar united in a unique testimonal to this quondam "Rebel," giving in his honor a great banquet in the Hall of the Inner Temple on June 30, 1883.

Said Sir Henry James, the Attorney-General, in proposing the health of their guest: "For who is the man save this one, of whom it can be said that he held conspicuous leadership at the bar of two countries?" Benjamin was moved by this great reception and the words spoken in his praise, and was listened to with rapt attention and sympathy as he replied: "The feeling of joy and gratification (at this testimonial) are counterbalanced—more than counterbalanced—by the reflection unutterably sad, that to the large majority of these present my farewell words tonight are a final earthly farewell—that to the large majority of you I shall never again be cheered by the smiling welcome, by the hearty handclasp with which I have been greeted during many years, and which had become to me almost the very breath of my life. It was on the 16th of December, 1832, that I was first called to the bar, and on the 17th of December last I had accomplished fifty years of professional life. . . . From the bar of England I never, so far as I am aware, received anything but warm and hearty welcome. I never had occasion to feel that any one regarded me as an intruder. I never felt a touch of professional jealousy. I never received any unkindness. On the contrary, from all quarters I received a warm and cordial welcome, to which as a stranger I had no title except that I was a political exile seeking by honorable labor to retrieve shattered fortunes wrecked in the ruin of a lost cause. . . . I must conclude by thanking you all from the bottom of my heart for the kind reception you have given me ever since I first came among you, down to this magnificent testimonial, the recollection of which will never fade from my memory, and on which I shall always love to dwell. I thank you all."

Returning to Paris after thus bidding adieu to the scene of his great and well-deserved triumphs, Mr. Benjamin seemed for a short time to recuperate. On May 6, 1884, he died at his house in Paris. Great was the sorrow manifested in England, deep was the grief felt in the distant state he had loved and served so well, when these somber tidings were known. An intellect profound and original in its conception, luminous in its exposition, slept to wake no more. The last chapter had been written of a career unique in its diversity and interest, and great and inspiring in its accomplishments. His body lies in the great cemetery of Pere Lachaise.

It is indeed singular that Benjamin never wrote a story of his life, and still

more singular that he desired none. Periodically he destroyed all his letters and papers, thus making it practically impossible for any adequate biography to be written. "No letters addressed to me will be found," said Benjamin about a year before his death, "among my papers when I die. I have read so many American biographies which reflected only the passions and prejudices of their writers, that I do not want to leave behind me letters and documents to be used in such a work."

But, notwithstanding his custom of destroying his old letters and documents, Mr. Benjamin's accomplishments remain as facts, a record that is not likely to have a parallel. Many men may have achieved either of his successful careers, but few have been able to establish the second on the ruins of the first.

Benjamin's appearance was f,r from prepossessing. He had a strong, massive physique, being about five feet six inches in height, with broad shoulders and a well-formed head; his features were unmistakably oriental, but handsome and very expressive. His eyes were black, piercing. His voice had the strong resonant tones of the bugle with the softness of the flute. There was nothing of dignity in his gait or bearing, but these physical defects were overcome by his capacity for performing intellectual labor which has very seldom been equalled. It was said by Senator Vest that Benjamin was capable of performing the intellectual labor of a dozen ordinary men, and that he never seemed to be fatigued by professional or official duties. He was singularly amiable and sympathetic in his association with others, and showed an amount of diffidence and modesty which would scarcely be expected in one who had been an actor in so many scenes of conflict and turmoil.

Undoubtedly his chief source of strength, apart from his amazing energy and endurance, was his profound acquaintance with the principles of law, his capacity for logical analysis, and the extraordinary facility with which he expressed his arguments in impressive sequence and form. No superfluous word obscured the clarity of his contentions. His language was choice, his manner deferential, yet confident, and confidence carried with it conviction. He was particularly effective before the Judicial Council and the House of Lords, where the gravity of the issues, and the exceptional intellectual strength of the tribunals appeared to call for all that was in him of mental endowment and argumentative power.

An American visting the law courts of England described Benjamin as follows: "No lawyer I heard in England was so absolutely impersonal as Benjamin. He seemed to represent not his client but abstract justice, the law. He appeared for Themis, never raised his voice above the conversational tone, making no gestures, apparently having no personal interest in the event of the matter in hand; he stated his views upon the subject under discussion so easily and so quietly that no one not interested in it would have been moved to pay any attention, but anyone following him while he spoke, would be ready to declare at once that the traditional belief that the law is difficult, obscure or uncertain, is false. After he spoke all uncertainty seemed to vanish. There appeared to be but one view which in reason could be accepted, and that view

was presented so simply and clearly that it seemed that any boy of ten years of age could not fail to grasp it. No one familiar with the work will deny that the author of *Benjamin on Sale* was a lawyer of consummate learning, but more than to his learning I am convinced he owed his success at the Bar to his unequalled capacity for lucid statement. His manner of argument would not seem to be an effort to persuade, but simply a shedding of light upon a matter which had been raised in darkness."

Although Benjamin did not hold to the tenets of the Jewish faith, his race was throughout his career a target of attack upon him. It has been said that his relations with Jefferson Davis began through some objectionable remarks of this nature, made by Davis concerning him in the Senate in June, 1858, which led to Benjamin's challenging Davis to a duel. Davis withdrew the remarks and intimate relations of mutual respect and esteem began. More generally is accepted the statement that in the early fifties he was taunted by a distinguished adversary, a senator from Kentucky, about his faith, when he was referred to in the open Senate as "that Jew from Louisiana." Benjamin promptly replied: "It is true that I am a Jew, and when my ancestors were receiving the Ten Commandments from the immediate Hand of Deity, amidst the thundering and lightning of Sinai, the ancestors of my opponent were herding swine in the Forest of Great Britain."

Benjamin's views on slavery did not represent those of the majority of his race, but he is generally regarded today among the Jews as the greatest statesman, orator and lawyer American Jewry has produced, in spite of his identification with the "Lost Cause."

For rich variety of experience, for the lessons of unflinching courage, and steady cheerfulness in the face of disaster, Benjamin's life is most remarkable. Simple in his own habits and tastes, he cared for money only to use it for those he loved. Fond of the refinements of society, especially literature, and as he said, really by nature indolent, "loving to bask in the sun like a lizard," he had willingly sacrificed his only pleasures and ease for those he loved.

The lesson that can be drawn for lawyers from his life is that success in the practice of law waits patiently upon anyone who is prepared to make the sacrifice, and who has that infinite capacity for work, which after all is said and done, is genius, in the law or out of it.

"The atmosphere of his life was adversity, and the keynote of his success was work."

MEMORIAL RESOLUTION ADOPTED BY THE LAW LIBRARIANS' SOCIETY OF WASHINGTON, D. C.

Resolution upon the Death of the Honorable John Thomas Vance

WHEREAS, The Law Librarians' Society of Washington, D. C., has lost a distinguished leader in the untimely death on April 11, 1943 of its beloved first President, John Thomas Vance; and

WHEREAS, The American Association of Law Libraries of which this Society is a Chapter has suffered an inestimable loss in the passing of John Thomas Vance, a long-time member of the Association who had served as its President in 1933, as a member of its Committee on Index to Legal Periodicals, its Committee on Cooperation with Latin-American Law Libraries, and who through the years had contributed generously of his time and learning to the entire law library profession; now therefore be it

RESOLVED, That this Society mourns the death of a great law librarian whose devoted work in building up the collections in the Law Library of Congress has won the gratitude of the law librarians of the nation who will always revere his memory; and be it further

RESOLVED, That this Society spread upon its minutes this expression of its grievous sense of a deep professional and personal loss in the death of its leader and friend, and that a copy of this resolution be sent to the widow and family of the late Honorable John Thomas Vance, together with the expression of the profound sympathy of this Society.

HELEN NEWMAN,
President, Law Librarians' Society of Washington, D. C.

May 18, 1943.

AMERICAN ASSOCIATION OF LAW LIBRARIES BOOK EXCHANGE REORGANIZED

By ARIE POLDERVAART
Librarian of the New Mexico Law Library

At the meeting of the Executive Committee in Chicago, March 20, the exchange for duplicate and wanted law books which has been sponsored by the Association for several years was relocated at the New Mexico Law Library, Supreme Court Building, Santa Fe, New Mexico. The plan for operation of the exchange was reorganized to eliminate factors which interfered with its successful operation in the past by authorizing a small service charge for wants located through the exchange.

Under the old arrangement the library which handled the exchange assigned a member of its staff to take care of filing, mailing of notices and the numerous other details necessary to operate the

exchange, in addition to furnishing filing equipment and paying postage and cost of stationery in notifying libraries of books located. The only advantage to the library operating the exchange was that it received first chance at duplicate material offered through the exchange. This advantage proved inadequate to compensate it for time and expense involved.

Pursuant to the new arrangement any library may list its "wants" and duplicates with the exchange as in the past, but with the understanding in case of the wants listed that the library which has listed the wants will pay to the exchange a ten cent service charge for each book or document located.[1] It is the belief of the Executive Committee that a library which wants a particular book should be willing to pay ten cents to have the item located. Staff members of the library operating the exchange will do this work after their regular hours so that it will not interfere with their regular library duties. The service charges collected will operate as a revolving fund to pay for these services and to cover the expenses incurred by the library in operating the exchange, such as postage and stationery for notifying libraries of materials located, answering correspondence relative to the exchange and other needed materials.

It is hoped that under the new arrangement a truly active and efficient exchange will be built up. All libraries which have heretofore listed their books wanted with the exchange will be given an opportunity to withdraw any of the listings which they have made under the old plan. The Executive Committee directed Mr. Arie Poldervaart, Librarian of the New Mexico Law Library, and Miss Helen Newman, Executive Secretary and Treasurer of the Association, to work out necessary details for operation of the exchange in accordance with the new plan. In response to this direction the following rules and policies for operation of and participation in the exchange have been prepared.

[1] If all of the numbers of a periodical volume wanted are located at the same time, so that only one notice need be sent to the library, the ten cent service charge will cover all of them.

RULES AND POLICIES GUIDING OPERATION OF THE A.A.L.L. BOOK EXCHANGE

1. Any duplicate law book may and should be listed with the exchange.

The more duplicates that are listed the more likely it will be that someone else's wants will be located. Every such listing will increase the possibility of opening up an exchange for something the offering library itself may want. There is no charge for listing duplicate material.

2. Each library should list every book for the location of which it is willing to pay the ten cent service charge.

3. As soon as a book wanted is located, the library wanting the book will be notified.

This leaves it up to the library which has listed the want to make its own arrangements with the offering library for exchange or purchase of the item.

4. Statements covering the service charge will be made to libraries on a monthly basis when charges exceed one dollar; otherwise, once every six months.

5. Billing will be handled by the exchange and checks in payment of service charges are to be sent to the library handling the exchange, but shall be made payable to the American Association of Law Libraries.

This arrangement places responsibility for the necessary bookkeeping upon the exchange. It is furthermore in accordance with the recommendations of the Committee on Permanent Budget that all Association funds be cleared through the Secretary-Treasurer of the Association. Thus, while actual collection of the service charge rests with the library handling the exchange, moneys collected will be deposited with the Association. The Secretary-Treasurer of the Association will then draw on this fund to pay the library handling the exchange for services and supplies.

6. Both members and non-members of the American Association of Law Libraries may list their wants and duplicates with the exchange. However, member libraries will be given preference in event either supply exceeds demand or demand exceeds supply. Examples:

a. Member Library A and Non-Member Library B both list as a duplicate a legal document wanted by Library C. Library C will be notified to contact Member Library A.

b. Member Library A and Non-Member Library B both list as wanted a book offered by Library C. Member Library A will be notified to contact Library C.

This answers a twofold purpose. First, the larger the number of listings the more likely it is that the wants will be satisfied. Second, it will act as an incentive for non-members to join the Association.

7. In event two or more member libraries or two or more non-member libraries list the same item, the one prior in time will prevail. Example:

Non-Member Library A and Non-Member Library B both want a duplicate listed by Library C. Library A listed its want on January 5 and Library B on January 6 of the same year. Library A will be notified to contact Library C.

This will tend to encourage prompt listing of wanted and duplicate materials.

8. Whenever an item listed with the exchange as a duplicate or as a want is withdrawn because the supply of duplicates has been exhausted or the need filled, the exchange shall be notified immediately so that the listing may be withdrawn.

The necessity for this provision is obvious since the exchange will otherwise continue to carry the item, causing ultimate expense and embarrassment.

9. When a want and a duplicate are brought together, both want and duplicate cards will be withdrawn, unless a card indicates that more than one copy is offered or wanted.

Thus, if three copies of a particular item are offered, the card will not be withdrawn until three wants have been filled. If no number of copies is indicated, it will be presumed that only one copy is available and the card will be withdrawn when the first want and duplicate are matched.

10. All duplicates and wants listed with the exchange should be entered upon 3 x 5 cards, with each item wanted or offered on a separate card. In order to secure uniformity, the general form of author entry used by the Library of Congress should be employed. The text description of the item may be abbreviated as in the case of session laws. Cards listing duplicates should be marked "Dup" in the upper *left*-hand corner on the front of the card; cards listing wants should be marked "Want," likewise in the upper *left*-hand corner of the card. If more than one copy is offered or wanted, the number should be added immediately following the word

"Dup" or "Want." The name of the library offering or wanting the item should be stamped on the lower half of the card. The date on which the card is received will be stamped in the upper *right*-hand corner by the exchange.

Libraries which desire to do so may use regular Library of Congress cards for listing their wants or duplicates, particularly when these can be completed with a minimum of additional marking, as when insertion of the word "Dup" or "Want" and the name of the library is all that is required.

The following examples illustrate the recommended form for listing some of the leading classes of law books:

Want

Idaho state bar.
Proceedings . . . Vol. 1, 1925, 1st annual meeting.

(Name of Library)

Dup 3

New York (*State*) *Attorney general's office.*
Annual report—1918
386 p.

(Name of Library)

Dup

Missouri. *Laws, statutes, etc.*
Session laws. 1881 Jan. 31st Ass'y reg. sess.
235, 3, xxvi p.

(Name of Library)

Dup

Newell, Martin L.
The law of slander and libel in civil and criminal cases, . . . 4th ed., by Mason H. Newell. Chicago, Callaghan and company, 1924.
xxx, 1109 p.

(Name of Library)

Want 2

New Mexico. *Supreme court.*
Report of cases determined.
Vol. 27.

(Name of Library)

Want

North Dakota. *Laws, statutes, etc.*
Compiled laws of the state of North Dakota, 1913. . . . Rochester, N. Y., The Lawyers co-operative publishing co., 1914.
2 vols.

(Name of Library)

CURRENT DEVELOPMENTS IN PLEADING, PRACTICE AND PROCEDURE IN NEW YORK*

By HAROLD R. MEDINA
Member of the New York Bar

Upon approaching the task of reviewing the developments in civil procedure in the state of New York in the two years which have elapsed since the making of a similar address on January 9, 1941,[1] my first impression was one of amazement that so many important and far reaching changes had been made in our practice in so short a time. Perhaps the Judical Council, the Law Revision Commission, the Bar Association Committees and the law professors interested in such matters are just getting into their stride. In any event, the product is substantial and appears to be definitely on the increase. Let us hope that when the large number of lawyers in the armed forces of the United States return to the practice of their profession after the war, they will survive the shock of finding that they will practically have to learn the rules of practice and procedure over again.

No attempt will be made tonight to give a comprehensive review of all these changes in the law, to say nothing of the various developments and innovations by way of judicial decision. It is hoped that the discussion of those areas selected for attention may prove interesting and helpful.

Sufficient time has now elapsed to give a more mature judgment on the effect of the five-sixths verdict rule and the general use of women on juries. It is my own conviction, as I was inclined to suspect from the first, that the five-sixths verdict rule is an unfortunate and undesirable step toward the disintegration of the jury system and I favor going back to the old rule which required a unanimous verdict.

It will be recalled that when the five-sixths verdict first became effective, it was anticipated that there might be formulated some rules which would require deliberation by the entire jury of twelve, for a certain period of time, before a five-sixths verdict could be rendered. No such rule was ever put into effect and it soon became apparent that jurors generally were informed of the fact that the concurrence of ten was sufficient for decision so that, taking human nature as it is, any rule requiring discussion for a stated time would have been a futile gesture. The effect is, in my judgment, that the jury starts its deliberations and if ten out of the twelve agree, that is an end to the matter. It may well be that the remaining two are the most forceful and intelligent of the twelve and that a full and fair discussion would have resulted in a unanimous verdict in accordance with the views of the two original dissenters. This has happened not infrequently in the past. And yet, under the existing system, the practical effect

* A lecture delivered January 12, 1943, before The Association of the Bar of the City of New York under the auspices of its Committee on Post-Admission Legal Education.

[1] N.Y.L.J., Feb. 10, 1941, p. 630, col. 1; N.Y.L.J., Feb. 11, 1941, p. 648, col. 1; N.Y.L.J., Feb. 13, 1941, p. 670, col. 1; N.Y.L.J., Feb. 14, 1941, p. 690, col. 1; N.Y.L.J., Feb. 17, 1941, p. 730, col. 1; N.Y.L.J., Feb. 18, 1941, p. 748, col. 1; N.Y.L.J., Feb. 19, 1941, p. 766, col. 1; N.Y.L.J., Feb. 20, 1941, p. 784, col. 1.

is to exclude the views and the reasoning of two of the jurors. And there can be little doubt that this is so in view of the very substantial number of five-sixths verdicts which are demonstrated by court statistics.

Doubtless a certain amount of time is saved; and disagreements, which never were very numerous, are now reduced to the vanishing point. It seems to me that these slight advantages are not worth the price. This depends in large measure upon one's view of the jury system as a whole. I happen to believe that it is one of the great bulwarks of our liberties and our rights and I can see no reason why the system should be impaired and emasculated.[2]

Women jurors have apparently come to stay. One is forced to admit that it gives one a creepy feeling to read about the few isolated cases in which juries, composed entirely of women, render verdicts not only in civil but also in criminal cases. But these unusual situations are few and far between and probably have no significance. Whatever preponderance in number women may have at the moment will doubtless disappear after the war. My own experience with juries has led me to suspect that the old-fashioned views most of us had about the fundamental characteristics of men and women need considerable revision. I may be wrong, but I am rather inclined to the view that women are, by and large, not nearly so sentimental as men. I could add other observations but probably no two people think alike on the subject and I merely mention this as I think a good many lawyers approach the trial of a case before a mixed jury with mistaken notions of the reactions which are to be expected from the women jurors. They have a very practical sense of the value of money and do not readily respond to pleas based upon sympathy and sentimentality. The jury system will doubtless function better for their presence.

[2] For an excellent statement of the contrary point of view, see Winters, *Majority Verdicts in the United States* (1942), 26 J. Am. Jud. Soc. 87.

Court of Appeals Practice

By all odds the most important changes in our procedure are contained in the thorough revision of Article 38 of the Civil Practice Act relating to appeals to the Court of Appeals. This revision was made under the leadership and guidance of the Judicial Council. The actual draftsmanship of the new proposals, as well as of the explanatory comments in the 1942 report of the Judicial Council, was by Henry Cohen, author of "The Powers of the New York Court of Appeals." These proposals were in turn the subject of exhaustive study by the Special Committee of the New York State Bar Association on the Jurisdiction and Practice of the Court of Appeals, of which I was a member. No lawyer should fail to study, with some care, the new Article 38 of the Civil Practice Act in its entirety and also the full report of the Judicial Council appearing at pages 421-44 of its *Eighth Annual Report* (1942). The comments by Mr. Cohen, which appeared last week in five successive issues of the *New York Law Journal*,[3] are also very helpful and informative.

The changes fall into two general categories. The first of these requires little

[3] N.Y.L.J., Jan. 4, 1943, p. 20, col. 1; N.Y.L.J., Jan. 5, 1943, p. 36, col. 1; N.Y.L.J., Jan. 6, 1943, p. 54, col. 1; N.Y.L.J., Jan. 7, 1943, p. 72, col. 1; N.Y.L.J., Jan. 8, 1943, p. 90, col. 1.

discussion and consists in a rearrangement of the material and a restatement of the provisions for purposes of clarification; that is to say, for the purpose of making each such provision perfectly plain to the average practitioner who is in no sense a specialist in practice before the Court of Appeals. This group of amendments is purely verbal and the existing rules and procedure remain unimpaired and unaffected. In some instances the wording is specifically designed to warn lawyers against what have heretofore been hidden pitfalls. For example, a considerable number of rather unfortunate results have occurred where appeals have been taken from an order of the Appellate Division granting a new trial or affirming an order granting a new trial, and a stipulation for judgment absolute has been filed. Section 588 as now amended contains the affirmative statement "and upon such appeal the Court of Appeals shall affirm and render judgment absolute against the appellant unless it determines that the Appellate Division erred as a matter of law in granting the new trial." This has been the rule all along and has been stated in many of the opinions of the Court of Appeals; but some lawyers, nevertheless, seem to have had the impression that they could obtain a reversal of the order and a reinstatement of the determination of the original court deciding the matter, upon showing some error in the reasoning of the Appellate Division.

Despite the plain warning of the section as now amended, I am rather inclined to think that lawyers will be found who will continue to take the same unnecessary risks as in the past, with the result that judgment absolute on the stipulation will be entered against them. I am afraid that the real trouble is that those unfamiliar with appellate practice have not a sufficient understanding of the distinction between matters of law on the one hand and matters of fact and discretion on the other. No number of attempts at statutory clarification will remedy a difficulty of this sort.[4]

The second category of changes has to do with matters of substance, which really bring about a change in the practice. With respect to these, it may be stated at the outset that it was the opinion of many persons interested in the subject that Article 38 should be left alone until such time as there was a general revision of the Judiciary Article of the New York State Constitution. Many of the changes which were proposed, however, gave promise of being so salutary that it was thought that the job should be done, and could be well done, provided that scrupulous care was taken to avoid any conflict between the new provisions of Article 38 and the Judiciary Article of the Constitution. It would unduly prolong the discussion were these constitutional questions commented upon. Suffice it to say, that it appears to be the unanimous judgment of all those who studied the proposed changes that they in no way offended any provision of the Constitution.

No attempt will be made to discuss all the changes but it is thought desirable to refer to some of the most important. Two rules of long standing, each of which has caused repeated injustice, have been abolished. The change has been brought about largely through the new

[4] I favor the complete elimination of the stipulation for judgment absolute. While this procedure has been useful in a few instances, it has in the past and in my judgment will continue in the future to do more harm than good.

wording of Section 590 which is entitled "Alternative appeals after interlocutory judgment or order in Appellate Division or denial of new trial."

The first of these two unjust rules was to the effect that a reversal by the Appellate Division of an order setting aside a verdict and granting a new trial, which order of reversal reinstated the verdict, was an order of affirmance and the judgment entered thereon a judgment of affirmance.[5] It would be useless to inquire into the origin of this rule despite the fact that instance after instance arose in which lawyers naturally assumed that an order of reversal was an order of reversal within the meaning of the sections applicable to appeals to the Court of Appeals, and that the judgment entered on the order was one of reversal. Time and again the Court of Appeals wrote opinions restating the rule as a warning to the profession, but to no avail. Now the rule is gone. The rule as it formerly existed was nothing but a trap for the unwary and it will be missed only by those who take particular joy in defeating their adversaries on meaningless technicalities.

The other rule is known as the rule of *Kennedy* v. *Lownes* (229 N. Y. 563). As in so many other instances, the brief memorandum of the court gives little indication of the ruling actually made. The situation concerns the Appellate Division's making an interlocutory determination which, because it is one of reversal or modification, presents the possibility of an appeal, as a matter of right, directly to the Court of Appeals from the final judgment entered after the completion of the additional proceedings necessary in the court of original jurisdiction. When, for example, in an action in equity for a partnership accounting, the underlying issues of fact and law are tried out at Special Term, an interlocutory judgment entered and an appeal taken to the Appellate Division, there result a reversal and new findings requiring further proceedings in the court below, such as an accounting between the partners—in such a case, after additional proceedings in the court below and the entry of a final judgment, there is a clear right to appeal directly to the Court of Appeals, thus reviewing the determination made by the Appellate Division in its interlocutory order above described. In many such instances the appellant, desirous of reviewing the new proceedings had in the court of original jurisdiction after the making of the interlocutory order by the Appellate Division, would appeal to the Appellate Division. By this appeal to the Appellate Division, according to the doctrine of *Kennedy* v. *Lownes*, the appellant forfeited his right to appeal as of right to the Court of Appeals and thus to review the interlocutory order of the Appellate Division. This rule is now no longer in effect and Section 590 specifically gives a right to review in the Court of Appeals. The matter is now set forth quite fully in the section so that there can be little room for misunderstanding or mistake.

The new Section 592 states with certainty the time within which and the manner in which motions for leave to appeal must be made, thus clarifying the existing practice, particularly with reference to the period of the summer recess. Section 592 together with Section 562 as amended, also makes changes of substance which will doubtless be re-

[5] See Markiewicz v. Thompson, 246 N. Y. 235; 158 N. E. 314 (1927).

garded by some members of the bar as an invitation to dilatory tactics by people with cases of purely nuisance value. The general idea is to eliminate, so far as possible, situations in which the right of appeal has been lost owing to ignorance of the existing practice.

It would be difficult to make a complete catalog of the number of ways in which an ill-informed attorney may unwittingly sacrifice an opportunity to appeal to the Court of Appeals. In general the slips made in the past have had to do: (1) With an attempt to appeal as a matter of right when the circumstances did not warrant such an appeal; (2) The taking of an appeal from an order, whereas, the appeal should have been taken from the judgment entered on the remittitur of the Appellate Division; (3) The taking of an appeal pursuant to permission when the appeal should have been taken as a matter of right; (4) The taking of a direct appeal to the Court of Appeals from the judgment of a court of record of original jurisdiction when the question involved was not solely a question of constitutional law; and (5) In summary judgment cases and others of similar character in which an appeal had been taken from an order and the judgment entered on such order was not entered until after the service of the notice of appeal and before the entry of the order of the appellate court upon the appeal.

In general, the summary judgment situation is now taken care of by Section 562 which provides that the notice of appeal from the order "shall be deemed to specify a judgment upon such order entered after service of the notice of appeal and before entry of the order of the appellate court upon such appeal."

The other situations are covered by provisions of Section 592 to the effect that after the dismissal by the Court of Appeals of an appeal taken as of right, the appellant may apply to the Appellate Division for permission to appeal "provided that appeal lies pursuant to such permission and that the proceedings have not been improperly delayed." Similarly, when the Court of Appeals dismisses an appeal taken directly from a judgment of a court of original jurisdiction, appeal may be taken to the appropriate appellate court within 30 days after the entry of the order of dismissal. Other similar provisions are contained in Section 592 and it will serve no useful purpose to attempt a comprehensive treatment.

In this same connection, the clarification of some of the sections has been along the lines of stating with the utmost precision that the word "judgment" means a judgment in an action and that the word "order" means an order in a special proceeding, and the details are set forth with such meticulous care as to indicate the clerk of the court where the respective judgments or orders are entered in the various cases.

It may be a mistake to give defeated litigants too many bites of the cherry, particularly as experience shows that a good deal of trouble and expense is caused whenever the nuisance value of litigation is increased. There are always unscrupulous persons only too ready to profit by such opportunities and it would seem to be almost impossible to demonstrate in any given case that "the proceedings have not been improperly delayed."

Another change which is undoubtedly a good one is contained in Section 605.

This section refers to an instance where the Appellate Division has made new findings and the section as amended gives the Court of Appeals the right to review not only the new findings of fact but also all the questions of fact in the case. This is accomplished by including the phraseology of the Constitution itself, to the effect that the Court of Appeals "shall review the questions of fact."

What is regarded by most people as the most important series of changes has to do with the thorny subject of creating a procedure which should make it perfectly plain whether or not the Appellate Division has passed upon the facts. The new provisions are contained in Sections 602, 606, 607 and 620. Rule of Civil Practice 239 and Subdivision 6 of Rule of Civil Practice 202 have been eliminated.

It is difficult, without entering into a prolonged discussion, to point out the uncertainties and injustices of the old system. These have been set forth with some care in the study made by the Judicial Council and also in Mr. Cohen's comments appearing in the *Law Journal*. The trouble had its origin in the fundamental distinction between matters of law and matters of fact; it was aggravated by the haste with which the Appellate Divisions are required to work in order to keep their calendars clear, which allowed insufficient time to determine with meticulous care in every case the questions of law and the questions of fact which were decided; and, finally, by the formulation by the Court of Appeals of a series of presumptions which everybody must concede were frequently without very reasonable foundation.[6]

In any event, the new system rests upon the absolute requirement appearing in Section 602 that wherever the Appellate Division reverses or modifies and thereupon renders a final or interlocutory judgment or order, it shall not only state, as heretofore, whether its determination is upon the law or upon the facts or upon the law and the facts but "the order shall also state whether or not the findings of fact below have been affirmed." The section continues "if the order of the Appellate Division does not comply with the requirements of this section, the Court of Appeals shall presume that the questions of fact were not considered by the Appellate Division." Section 606 provides that when it appears that the findings of fact were not affirmed or considered by the Appellate Division, no determination shall be made by the Court of Appeals based upon the findings of fact made in the court of original instance and it is required that the Court of Appeals "shall remit the case to the Appellate Division for determination upon the questions of fact raised in that court."

Section 620 makes appropriate provisions for the recitals to be contained in the order of the Appellate Division; and, finally, the new Section 607 continues the provision formerly contained in Rule

[6] The elaborate study of the Judicial Council and the comments by Mr. Cohen referred to in a preceding footnote reveal numerous illustrations of cases where unreal and elaborate presumptions of one kind and another have apparently worked injustice. In practically every instance the occasion for any presumption at all lies in the lack of power in the Court of Appeals in most cases to review the facts. A solution, which is deserving of the most thoughtful consideration whenever a revision of the Judiciary Article of the New York Constitution is undertaken, is to give the Court of Appeals some general power to consider the facts in all cases properly before it. This is no novelty in appellate court procedure, as is indicated by the powers of the United States Circuit Courts of Appeals under the new Federal Rules and the more extensive powers of review of the facts exercised by many of the state courts of last resort throughout the country. I gravely doubt that such a change would overwhelm the Court of Appeals with additional work.

202, Subdivision 6, to the effect that the opinion of the Appellate Division shall be part of the judgment roll or appeal papers and "The opinion shall not, however, unless referred to in the order, serve to supply any fact required in this article to be stated in the order of the Appellate Division."

The Special Committee of the New York State Bar Association was opposed to the inclusion of this last sentence as it would seem in a sense to invite a return to some of the old uncertainties. In other words, in an effort to reduce the labor of formulating orders in exact compliance with the new procedure the practice might well grow up in the Appellate Divisions of referring as a matter of course in every order to the opinion so that the opinion should thus become part of the order. In the interest of certainty and good practice it would seem better to have the matter deliberately and carefully worked out in every instance rather than to compel lawyers to go through the statements of a long opinion and reach some determination as to its proper interpretation. Perhaps the point is not of great practical importance.

Examinations Before Trial

The development of legislation on this subject is extremely interesting and it illustrates the natural growth of a sound principle of procedural reform. Some years ago the Judicial Council advocated broad and general examinations of both parties before trial. The legislature has consistently failed to follow this recommendation. The new Federal Rules permit this sort of general examination before trial and, despite occasional abuse, the operation of the Federal Rules in this respect seems to have been satisfactory and definitely in the interests of justice.

What has happened in New York is that the entering wedge of this substantial reform has been inserted in response to a rather general demand which made itself felt in opposition to the rulings of the courts which, in effect, prohibited the examination before trial of officers, agents and employees of municipal and other public corporations. While it was easy to see the force of the arguments advanced by the law departments of the various municipalities, the fact remained that the rulings thus made proved an effectual barrier to any ascertainment of the facts in such cases and it was thought that considerable injustice was the result.

As is typical in such cases, the reform was accomplished piecemeal and without any regard for logic or rational arrangement. The first break came when the legislature in 1941 passed the new Section 292-a of the Civil Practice Act, the immediate occasion of which was the taking over of the subways by the city of New York. It was obvious that the mere change of ownership should not bring about a complete change in the law applicable to the examination of persons solely in possession of knowledge relative to accidents and so this section was passed chiefly for the purpose of affecting the subways. Thus its language was such as to affect only a cause of action "against a municipal corporation arising out of the ownership, operation or maintenance of a public utility"; the examination was to be had only "upon motion made upon notice"; and the examination was only to be ordered in the court's dis-

cretion. So far, so good. There was then added the following significant sentence: "Any such examination granted in a negligence action shall not be limited so as to prevent or restrict the inquiry concerning the facts of negligence, liability or damages."

The addition of this last sentence was the consummation, even in this extremely limited area, of the attempt persistently made year after year by the Judicial Council to eliminate the conflicting rulings on examinations before trial in general as between the various departments of the Appellate Divisions of the state. In certain parts of the state, examinations before trial were generally restricted to such matters as ownership and control, whereas elsewhere examinations before trial were generally permitted on the issues of negligence, liability or damages.

It is to be noted that this new Section 292-a, as added in 1941, left it to the court's discretion as to whether or not an examination before trial of "one or more of the officers or employees of such municipal corporation" should be had, but the final sentence above quoted left it open to construction as to whether the court might exercise its discretion by way of limiting the character of the examination when once ordered.

This interesting question came up squarely for decision in *Mitchell* v. *City of New York,* 178 Misc. 212, where Judge Eder, sitting at Special Term of the Supreme Court, New York County, having decided that an examination before trial should be had, ruled that the special language of the section was such as to deprive him of authority to limit the examination. Accordingly, the examination was permitted to continue relative to the underlying facts of negligence and liability. Judge Eder said:

> The defendant contends that the examination which the plaintiff seeks is rather general in character and cites Shaw v. Samley Realty Co., Inc., 201 App. Div. 433, to the effect that a general examination should not ordinarily be exercised in negligence cases. It seems to me that this special enactment, with respect to ownership, maintenance or operation of a public utility by a municipal corporation, contemplates, in this class of cases, a larger scope of examination, indicated by the phrase "shall not be limited" in such a negligence action "so as to prevent or restrict" the inquiry "concerning the facts of negligence, liability or damages." In view of this I am of the opinion that plaintiff is entitled to an examination before trial to the extent desired. If it was the intention of the legislature that previously existing limitations should continue, other than to authorize the examination before trial of a municipal corporation, then the statute needs clarification which I think should come by way of legislative amendment. In Ward v. Iroquois Gas Corp., 258 N. Y. 124, 129, the court declared: "Courts must take the act as they find it and construe it according to the plain meaning of the language employed. If the section is to be given a wider effect, it must be by an act of the legislature."

This ruling was affirmed, without opinion, by the Appellate Division of the First Department, 264 App. Div. 753.

Thus the stage was set for the next step, which was taken in 1942. The present Section 292-a, as amended in 1942, eliminates the restriction to public utility cases and now makes the examination before trial possible, in the court's discretion, "where a public corporation is a party to an action."[7] The final sentence of the section remains just as it did in the original section as added in 1941.

The effect apparently is that the court may in its discretion permit an examination before trial of any municipal or

[7] See definition of "public" corporation in General Corporation Law §3, as amended by Laws 1941, c. 460.

"public" corporation, the phraseology recommended by the Judicial Council having been deliberately made as broad as possible; and if the theory of Judge Eder's decision is to be continued as applicable to the section as amended, which seems quite likely, the courts will in the vast majority of tort cases, in which a municipal or other "public" corporation is a party, permit a rather general examination before trial. And this is what the courts are now doing.

Apparently, no test has been made of the matter in the Appellate Courts since the legislature amended Section 292-a in 1942. Doubtless when a particularly good case is presented for a test, the city of New York will take the matter up.

In the meantime, the machinery of law reform is slowly grinding out its product. After a year or two of experience under this section, it seems inevitable that what little remains of the conflict between the various Appellate Divisions, relative to general examinations before trial, will disappear. Furthermore, it would not seem to be a bad guess that experience under this new section will lead to a further and more significant extension of the practice.

Mistake of Fact

Upon the recommendation of the Law Revision Commission a veritable Pandora's box was presented to the bench and bar in the form of a new Section 112-f of the Civil Practice Act providing "When relief against mistake is sought in an action or proceeding or by way of defense or counterclaim, relief shall not be denied merely because the mistake is one of law rather than one of fact."

That this is a thorny subject must be apparent even to the casual observer. And yet it is hard to be critical of an effort to eliminate, at least in part, the manifold injustices arising out of the long settled rule in this state against granting relief from a mistake of law.

The pamphlet containing the study of the Law Revision Commission on the subject (*Report for 1942,* Legislative Document (1942) No. 65 [B]) apparently is restricted to "Restitution of Money Paid under Mistake of Law," although the language of the new section is evidently much more comprehensive. This pamphlet is worthy of most careful study as it includes material from other jurisdictions and also a copy of the somewhat elaborate treatment of the subject in the *Restatement of Restitution* of the American Law Institute.

It seems reasonably clear that the new section definitely changes the law applicable to the fairly common situation when money is paid and received under a mutual mistake of law, pure and simple. For example, in *Matter of Welton,* 141 Misc. 674, Surrogate Wingate was compelled, under the existing law, to deny an application for restitution when a sum of money had been paid by administrators to the adopted daughter of the decedent's deceased brother, the payment having been made and received upon the understanding by both sides that the recipient of the money was one of the next of kin and entitled to the money under the laws of distribution. Under the new section, it seems clear that a recovery would now be permitted in such a case.

As to the general effect of the new section, it seems futile to make any forecast since the entire subject is honeycombed with complications of one sort

or another and an entirely new body of law will have to be worked out by the courts. Just how the various conflicting "equities" will be reconciled and how far the rules now applicable to mutual mistakes of fact or unilateral mistakes of fact will be applied, it seems hopeless to conjecture. In the end, however, it seems highly probable that the new section will work a decided improvement in the law, despite the fact that there may be, in the meantime, uncertainty and considerable litigation.

Requests for Admissions under Section 322

It will be recalled that old Sections 322 and 323 of the Civil Practice Act, relating to demands for the admission of the genuineness of a document or the admission of certain facts, never proved very effective, nor were these sections used to any appreciable extent by members of the bar. This was due in large part to the very mild penalty for an unreasonable failure to make the requested admissions, so that the sections thus deprived of any sanction or teeth accomplished little good.

At the time of the adoption of the Federal Rules of Civil Procedure, it became evident to members of the New York bar that the whole system in force in the federal courts was much more effective in the elimination of fictitious and unreal issues which served only to make litigation more cumbersome and expensive.

Considerable study was made both by the Judicial Council and by the Committee on Courts of Superior Jurisdiction of the Association of the Bar of the City of New York looking toward the improvement of the New York procedure in this respect.

No one seems to have been much impressed with the great practical advantages of exact uniformity whenever possible between the New York procedure and the Federal Rules. If simplicity of rules of procedure were really a substantial desideratum, it would seem worth while to make sacrifices on both sides so that uniformity might exist.

Nevertheless, the recommendation of the Judicial Council, which is now embodied in the present Section 322, as amended in 1941, in effect adopts the practice of the Federal Rules relative to admissions but proceeds to improve upon them; and, it must be confessed, the improvements seem substantial and in every way reasonable.

Section 322 now permits any party "after the pleadings are closed" to serve a written request for admissions. These admissions are not restricted as formerly to the genuineness of relevant papers or documents or to matters of fact but may relate as well to photographs. The machinery now provided, which is definitely along the lines of what has proved so successful in connection with bills of particulars and examinations before trial, is to put the onus upon the person upon whom the demand is served. This is accomplished by a provision that the matters of which an admission is requested shall be deemed admitted unless within a period designated in the request and not less than eight days after service thereof or within such further time as the court may allow on motion and notice, the party to whom the request is directed serves upon the party requesting the admission a sworn statement either denying specifically the matters of

which an admission is requested or setting forth in detail the reasons why he cannot truthfully either admit or deny those matters. When the matters are such that the admission cannot fairly be made without some material qualification or explanation or when they constitute a trade secret or involve some privilege or disqualification as a witness, the party may serve a sworn statement setting forth the details of such claim; and if the claim is that the matters cannot be fairly admitted without some material qualification or explanation, the statement must admit those matters with such qualification or explanation. In other words, if the eight-day period passes and the party upon whom the notice is served does nothing, the admission is deemed to have been made.

Such admissions are subject to all pertinent objections at the trial and provision is further made for an order allowing the amendment or withdrawal of any admission "on such terms as may be just."

The real teeth of the section are to be found in the third and last subdivision which, in effect, provides that when a sworn denial or sworn statement, as above set forth, has been served and the admission thus refused, application may be made to the court "at or immediately following the trial" for an order requiring the party refusing the admission to pay the reasonable expenses incurred in making the proof "including reasonable attorney's fees." The payment of these expenses is, of course, only to be required if the court finds that there were no good reasons for the denial or refusal of the admission. It is further provided that in case of a jury trial the application for an order directing the payment of such expenses "shall not be heard or determined in the presence of the jury."

While it is always hard to foresee all the practical difficulties which may arise in the administration of new practice provisions, it would seem that Section 322, as it now stands, is all to the good. Curiously enough, members of the bar do not seem to have realized the importance of the change thus made since inquiry does not reveal any substantial increase in demands for these admissions, despite the fact that the section as amended has been in full force and effect since September 1, 1941.

Declaratory Judgments

A very interesting situation gradually came to a head with reference to questions of fact in declaratory judgment actions. There was an intimation, as early as the case of *Dun & Bradstreet, Inc.* v. *City of New York*, 276 N. Y. 198, that perhaps the remedy of declaratory judgment might be held inapplicable when questions of fact arose. The Court of Appeals in that case at page 206 made the statement:

> The undisputed facts in this case make it peculiarly one where the remedy of a declaratory judgment should be granted. That remedy is applicable in cases where a constitutional question is involved or the legality or meaning of a statute is in question and no question of fact is involved. In such cases, pure questions of law are presented. It would be difficult to imagine a case where that remedy would be more applicable.

The brief *per curiam* opinion in *German Masonic Temple Assn.* v. *City of New York*, 279 N. Y. 452, again emphasized the circumstance that "there is no issue of fact." These and other expressions gave rise to the notion that there was gradually developing in this state an unfortunate limitation flatly in-

consistent with Rule 213 which, under Title 25 of the Rules of Civil Practice governing declaratory judgments, specifically provided that the court might in such cases in its discretion settle questions of fact for submission to a jury when that was deemed advisable. It requires little argument to demonstrate that this provision for settling issues of fact for trial by jury in declaratory judgment cases indicated that it was a perfectly proper and normal thing to have such issues of fact arise in that type of action.

It is noteworthy that the practice in the federal courts in this respect had been squarely determined as early as 1937 in *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, where in the course of an opinion by Mr. Chief Justice Hughes it was stated (p. 242):

> That the dispute turns upon questions of fact does not withdraw it, as the respondent seems to contend, from judicial cognizance. The legal consequences flow from the facts and it is the province of the courts to ascertain and find the facts in order to determine the legal consequences. That is everyday practice.

Whatever doubt had arisen in New York, owing to the statements in the various opinions of the Court of Appeals above referred to, was fortunately set at rest by certain comments in the opinion of Chief Judge Lehman in *Rockland Light and Power Co.* v. *City of New York*, 289 N. Y. 45, decided in July, 1942. He stated (p. 50-51):

> A declaratory judgment is ex vi termini a judgment on the merits. Until disputed "questions of fact necessary to be determined before judgment can be rendered" are settled, it is plain that rights and legal relations cannot be determined, defined and declared. See rule 213 of the Rules of Civil Practice. The court may, in the exercise of its sound discretion, decline to pronounce a declaratory judgment. Rule 212 of the Rules of Civil Practice. Its discretionary and extraordinary power is properly invoked only where resort to ordinary actions or proceedings would not afford adequate relief. A judgment declaring rights and other legal relations which could be challenged anew by either party in proceedings brought thereafter would be an anomaly and would serve no useful purpose. Upon a motion by the defendant to dismiss the complaint on the ground of its insufficiency, made before service of an answer, allegations of fact contained in the complaint are not in issue, and the court can determine only the question of law whether the pleading is sufficient to withstand challenge by demurrer or by its statutory modern substitute, motion to dismiss. If the court denies the motion to dismiss, then declaration of rights must await final judgment. If the court grants the motion to dismiss then it cannot logically grant, at the same time, a judgment on the merits declaring the rights and legal relations of the parties.

And again (p. 52):

> We point out here, parenthetically, the reference in the opinion in that case to the circumstances that "there is no issue of fact" is misread when it is construed as an indication that an action for a declaratory judgment must be dismissed whenever there are disputed questions of fact. The rules of Civil Practice to which we have already referred provide a method by which disputed questions of fact may be "settled." The existence of disputed questions of fact which could be settled expeditiously in an ordinary action or proceeding may nonetheless in a particular case justify or even constrain the court in the exercise of a sound discretion to decline to pronounce a declaratory judgment. We did not say or decide anything else and our reference to disputed questions of fact in the opinion in that and other cases should be read in its relation to the problems there presented.

Summary Judgment

In *Stone* v. *Aetna Life Insurance Co.*, 178 Misc. 23, Judge Cuff at Special Term of the Supreme Court, Kings

County, decided an interesting and novel point relating to the summary judgment practice. The action was one by a widow to recover the proceeds of a policy of life insurance and the defense was that when the deceased applied for the insurance he knowingly made false and untrue material representations as to his health. When the plaintiff moved for summary judgment, the defendant prepared affidavits setting forth certain limited facts which, on the face of the matter, would have seemed sufficient to justify the denial of the motion for summary judgment. The defendant, however, in an excess of caution made the unusual, if not unprecedented, motion to require the plaintiff to accept the affidavits as a sufficient response to plaintiff's motion for summary judgment, having first procured a stay, and this was the motion decided by Mr. Justice Cuff. The purpose of moving in this way was, as it were, to give the defendant two chances to defeat the motion for summary judgment. In other words, defendant's attorney stated that he possessed additional evidence but did not want to make any further revelation unless it was necessary to do so and the procedure here adopted was designed as a means of bringing about a preliminary determination as to the sufficiency of these affidavits to defeat the motion for summary judgment. Thus, if the court found that the evidence was not sufficient, the motion to compel acceptance of the affidavits would be denied, and defendant would thereupon serve further and more comprehensive affidavits and the motion for summary judgment would be decided on the merits.

While it may well be that, as stated by Mr. Justice Cuff, the mere novelty of a motion is no conclusive reason for denying the relief requested, it seems that his decision that this was a proper practice in summary judgment cases is erroneous. As no appeal was taken in that particular case, the matter has evidently not been passed upon by any appellate court.

There are a variety of objections to this new procedure: (1) There is nothing in Rule 113 to indicate that any such procedure was either authorized or contemplated, nor is there anything in the sections of the Civil Practice Act relating to motion practice in general to justify it; (2) If such procedure were to be permitted in the case of motions for summary judgment, it is hard to see why a similar procedure would not be available to those opposing many other types of motion; (3) This procedure would not only greatly complicate motion practice in general, where every effort should be made to simplify rather than to complicate, but it would lead to innumerable abuses too obvious for comment.

It may well be that there are instances in which it is not desirable to require a party to make a full disclosure of all his evidence and there are other instances in which the very nature of the case makes it appear that little should be required of the party opposing the motion for summary judgment. Many of these instances are set forth and discussed at some length on pages 83 to 91 of Judge Shientag's splendid book, *Summary Judgment*. While the trend has not all been in one direction, the courts have shown every disposition to work out rules of decision in summary judgment cases which should not do injustice. Illustrations of special situations are to

be found in cases on insurance policies, cases on promissory notes and many others in which the facts are peculiarly within the knowledge of one of the parties or when other special circumstances exist. Whenever necessary, it seems that the courts can be depended upon to make the proper ruling without going through any such cumbersome and seemingly unnecessary procedure as was adopted in this case.

Hospital Records

The records which probably come most frequently before the courts in connection with Section 374-a of the Civil Practice Act are hospital records. And yet, despite the fact that the production of such records is an almost daily occurrence in our trial courts, there has been no well considered and comprehensive treatment of the subject by the Court of Appeals. Such comments as are to be found in the various decisions on the subject leave the whole matter in a state of some confusion and doubt.

There is no doubt, of course, that the ordinary entries as to temperature, medication, chemical analyses, treatment and so forth are plainly admissible if there is proof that the papers produced are the hospital records themselves and that they were kept in the ordinary course of business. The scope of Section 374-a is obviously sufficiently comprehensive to cover records of this type.

The difficulty arises when the hospital charts or records contain, as they frequently do, statements of fact having nothing to do with the treatment or medication or actual physical condition of the patient but rather to matters of opinion, hypothesis or diagnosis. In some instances, these hospital records or charts set forth wholly extraneous matters having nothing to do with medicine or surgery or the condition of the patient.

Any thorough review of the authorities on this occasion would unduly prolong this address. Suffice it to say, that the matter is somewhat brought to a head by the ruling in *People* v. *Kohlmeyer*, 284 N. Y. 366, which involved a conviction of the crime of robbery in the first degree. The defendant having claimed insanity as a defense, the trial court had excluded copies of Wisconsin hospital records relating to the insanity of the defendant's paternal grandmother. These records "included diagnoses of manic depressive insanity." Having stated that no question of privilege was presented, the Court of Appeals held that the exclusion of these records was reversible error since proof of insanity in an ancestor was relevant. The records were found competent by the Court of Appeals because a physician, if called to testify on this subject, would have been competent to state his "scientific opinions as to the nature of illnesses, their causes and probable results, founded upon the facts disclosed in the evidence." The subject came up again in *Meiselman* v. *Crown Heights Hospital*, 285 N. Y. 389, but the discussion in that case appears to have gone off on a question relating to the nature of the objection that had been raised to the admissibility of the records.

It had been held in an earlier case (*Matter of O'Grady*, 254 App. Div. 691) that hospital records containing "the opinions of doctors with reference to the disorders of the patient are not

admissible."[8] Professor Wigmore in note 1 (1530a) page 392, volume 5 of his work on *Evidence*, comments caustically on this case as "another obstinate judicial balking at a progressive legislative measure."[9]

In several of the reported cases on the subject hospital records or a portion thereof have been excluded as "hearsay." Discussion along this line would seem only to add to the general confusion since it is plainly the purpose of Section 374-a to make an exception to the ordinary hearsay rule. Evidence of entries offered under Section 374-a is necessarily hearsay.

Probably Professor Wigmore and perhaps Judge Clark would argue that the section leaves the courts no discretion and that practically everything inserted in hospital records, pursuant to some duty to make the entry, is admissible. And there is much force to this contention. On the other hand, many of us who deal with these matters in the day to day work before juries feel that it is impractical to go so far without doing more harm than good. A particularly cogent argument is made by those who maintain that the admission of diagnoses appearing in hospital records is frequently unfair to plaintiffs and that the same is true of extraneous matters contained in the patient's "history."

The views expressed in the first opinion by the Court of Appeals on the subject of the scope of Section 374-a would seem to indicate the sound policy which should govern the ultimate statement of the rule applicable in the hospital record cases.

In *Johnson* v. *Lutz*, 253 N. Y. 124, the court affirmed a determination to the effect that a policeman's accident report filed by him in the station house was not admissible. The court reviewed the history of the section and the origin of the proposal in the report of the Legal Research Committee of the Commonwealth Fund published in 1927. This report made it clear that the new statute was intended to make rules of evidence relative to book entries in harmony with modern business conditions and practices so that the courts would "give evidential credit to the books upon which the mercantile and industrial world relies in the conduct of business."

As the report just referred to discussed chiefly commercial matters and the phraseology of Section 374-a was obviously much more comprehensive in its scope, it was apparent that the courts would be called upon to interpret the section. And the Court of Appeals in *Johnson* v. *Lutz* decided that in the various classes of cases arising under Section 374-a the court would be called upon to determine whether or not it was the intention of the legislature that the particular subject matter should be within the scope of the section. In other words, the section was not to be construed in a harsh and unbending literal fashion but rather with a view to accomplishing what the statute was designed to accomplish. Accordingly, the court held that it was never the intention of the legislature to include within the meaning of Section 374-a such matters as police reports relative to accidents. The court held (p. 129):

> The Legislature has sought by the amendment to make the courts practical. It would be unfortunate not to give the amendment a construction which will enable

[8] *Cf.* Cottrell v. Prudential Ins. Co., 260 App. Div. 986, 23 N. Y. S. (2d) 335 (4th Dep't 1940), in which the court excluded a part of the hospital record which contained the notation that the patient (the assured) had taken 10 bichlorid of mercury tablets.

[9] See opinion of Clark, J., in Ulm v. Moore-McCormack Lines, 115 F. (2d) 492, 494-5 (C.C.A. 2d, 1940).

it to cure the evil complained of and accomplish the purpose for which it was enacted. In construing it we should not, however, permit it to be applied in a case for which it was never intended.

The Court also made certain comments which appear to be peculiarly applicable to the situation under discussion. Reference is made to the general intention of the legislature to make the new section applicable "provided the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information." And the court then quotes from the old *Mayor* v. *Second Avenue Railroad* case where reference is made to entries "when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation."

Accordingly, sound principle would seem to require: (1) That hospital records be admitted only when no question of privilege is involved; (2) That the entries will be admissible only when they are made pursuant to some duty by the person making the entry; and (3) That the court must frankly decide concerning diagnoses, matters of opinion, and wholly extraneous statements of fact or opinion whether the legislature intended such matters to come within the scope of the section.

It may be asserted that the Court of Appeals has already decided the matter of diagnoses in the *Kohlmeyer* case above referred to. If so, it is too bad that the Court of Appeals did not give a better reason for its result. Perhaps some case will come up in which distinction may be made between one type of diagnosis and another. In any event, it is my own belief that sound principle would generally include as admissible entries made in hospital charts or records concerning the diagnosis of the case by the physician in charge.

On the other hand, there are a great many things contained in hospital records which would not seem to come within the general intention of the legislature in passing Section 374-a, even though the entries in question may be said to have been made pursuant to some duty to make them. For example, in *Gerocami* v. *Fancy Fruit and Produce Corp.*, 249 App. Div. 221, the hospital report contained the patient's "history." This history report was obviously made pursuant to a duty to make it and it contained the statement "Patient was hit by automobile 25 minutes before admission. He was intoxicated at the time." As in the case of the policeman's accident report above mentioned, the doctor who signed this patient's history report got the statement about intoxication "from some bystander there who claimed he brought the man into the hospital."

It would seem that this case is properly decided but that the reason for the decision should have been stated to be the same as in *Johnson* v. *Lutz*, namely, that the legislature never intended the section to apply to such entries as this. In other words, there is a distinction to be drawn between these and entries made in a hospital by nurses or doctors relative to conditions observed by them, medication ordered or administered by them and also the diagnosis of the case as arrived at by them in the course of the performance of their duties. On the other hand, it is at least arguable that entries relating to the history of the

patient prior to the patient's admission to the hospital in question, as well as all wholly extraneous matters having nothing to do with hospital treatment or medication, should be excluded.

It may be, however, that when the rule is ultimately worked out by the Court of Appeals, some emphasis will be placed upon the source of "history" reports and also upon the admissibility of testimony by the person making the entry, if that person were called at the trial. The authorities above referred to rather hint at this result but it is submitted that any such way of working the matter out would scarcely be in accord with the legislative intent.

Attachments

As I predicted when I made my last address on this subject before this Association on January 9th, 1941, the "streamlining" of the attachment procedure has not worked well. As seemed inevitable at the time, there has been, according to my information, a great deal of hardship upon plaintiffs. The new system definitely favors defendants and I think that some revision will have to be made.

The difficulty is chiefly with reference to the requirement that the plaintiff bring an action in certain instances within the ninety-day period, as provided in Section 922. Many members of the bar seem never to have become acquainted with the substantial amendments made in 1940 and 1941, despite the wide publicity given to those changes at the time.

In addition, it is my opinion that the ninety-day period is too short and that something should be done to ease up the provisions with reference to extensions of time. Furthermore, considerable confusion seems to have arisen from the fact that the first paragraph of subdivision 1 of Section 922 makes reference to the commencement of the action "within 90 days after the service of a certified copy of the warrant," and the following paragraph of the same subdivision refers to "the period of 90 days from the date of the service of the said warrant," whereas subdivision 2 refers to "90 days from the issuance of the warrant." In accordance with the immemorial habit of lawyers to put off action until the very last day, there have been quite a number of instances of lawyers who have neglected the ninety-day period from the date of the issuance of the warrant and then found that the ambiguity above referred to has made it impossible for them to get the necessary security to indemnify the sheriff in connection with the commencement of the action, to say nothing of the general likelihood that such proceedings are entirely nugatory.

Miscellaneous

While it would be futile to attempt any general review of the very substantial number of miscellaneous changes which have taken place in the last two years, it is possible to refer briefly to those which are the most important from a purely practical standpoint and there have been selected for this purpose four from 1941 and four from 1942, as follows:

(1) Section 113 of the Civil Practice Act now provides that a motion "is made when a notice thereof or an order to show cause is duly served."[10]

[10] See Stillman v. Stillman, 204 App. Div. 848, 197 N. Y. S. 951 (2d Dep't 1922).

(2) Decedent Estate Law, Section 119 has been amended so as to provide that, when two actions have been joined, in one of which damages are sought for injuries suffered by the decedent prior to death and the other for damages for causing death, contributory negligence is matter of defense in both cases.

(3) Section 903, subdivision 6, now allows an attachment when there is proof that the defendant is guilty of a fraud in contracting or incurring liability, as in the case of arrest.

(4) Section 112-e knocks out most of what was left of the old doctrine of election of remedies by providing that "A claim for damages sustained as a result of fraud or misrepresentation in the inducement of a contract or other transaction shall not be deemed inconsistent with a claim for rescission or based upon rescission. In an action for rescission or based upon rescission the aggrieved party shall be allowed to obtain complete relief in one action, including rescission, restitution of the benefits, if any, conferred by him as a result of the transaction, and damages to which he is entitled because of such fraud or misrepresentation; but such complete relief shall not include duplication of items of recovery."

(5) Section 1170-a permits the court to decide the question of custody of children even though the judgment of divorce or separation is one dismissing the plaintiff's complaint.[11]

(6) Real Property Law, Section 539, is a new section providing for a mandatory injunction in an action to remove an encroaching structure, thus changing what many people have thought was the unsound result arrived at in the much discussed case of *City of Syracuse* v. *Hogan*, 234 N. Y. 457, so that the law is now in accordance with the famous dissenting opinion of Judge Cardozo in that case.

(7) Section 403 has been amended so as to permit attorneys to issue subpenas in cases tried before a referee.

(8) Section 352 has been amended so as to place dentists upon the same footing as physicians and surgeons in matter of privileged communications.

Conclusion

Out of all this mass of changes, there is one thing which strikes me very forcibly. Despite all the talk about simplified procedure, we seem to be gradually making our procedure more and more complicated. A perfect illustration of this is to be found in the long and detailed and involved sections "streamlining" the attachment procedure. Numerous other instances could be given but it is sufficient to say that the whole tendency of recent years has been in the direction of attempting to improve our practice and procedure without the slightest regard for the simplification of practice. This is due partly to the continual effort for improvement in details and partly to attempts at purely theoretical or paper harmony.

If this tendency continues indefinitely, we shall be, if we are not already, faced with a situation in which our practice and procedure is known only to the experts who devote all their time to the study of matters of procedure.

It is my hope that the time will come when the state of New York will be willing to adopt rules of procedure

[11] See Davis v. Davis, 75 N. Y. 221 (1878).

which are truly simple and which do not attempt to cover with meticulous precision every conceivable contingency which may arise in the course of litigation. It is just as important that our judges be given some flexibility as it is that the judges of the federal courts be given some discretion in the administration of general rules of procedure. The effect of providing for every little detail necessarily hampers the work of the courts and greatly increases the burdens of lawyers who should be able to devote less of their time to the intricacies of procedure and more of it to the determination of causes on the merits.

DR. JAMES APPOINTED LAW LIBRARIAN OF CONGRESS

Eldon R. James, Law Librarian of the Harvard Law School from 1923 until June, 1942, has been appointed Law Librarian of Congress to succeed the late John T. Vance. Since July, 1942, Dr. James has been attached to the Transportation Corps of the War Department as a civilian attorney.

Indicative of the high esteem in which Dr. James is held by his law librarian colleagues is the resolution passed by the American Association of Law Libraries at the annual meeting in Milwaukee last June, which provided that a statement of appreciation be presented to Dr. and Mrs. James. A committee consisting of Mrs. Bernita J. Long of Illinois University, President of the Association, Mr. William S. Johnston of the Chicago Law Institute and Mr. William R. Roalfe of Duke University, was appointed to draw up the resolution and have it suitably prepared.

Upon the completion of the drafting, Mr. Lester W. Arkin, Vice President of the Book Shop Bindery in Chicago and an associate member of the Association, took over the supervision of the engrossing and binding and prepared a handsome blue leather folder containing the engrossed Appreciation.

On April 22, 1943, the presentation was made by Miss Helen Newman, the Association's Executive Secretary and Treasurer, and Associate Librarian of the Supreme Court of the United States, at a dinner party in the Colony Room of the Statler Hotel, Washington, D. C. Other guests were Mr. Roalfe, Mr. Francis Dwyer and his sister Miss Madalen Dwyer of the Library of Congress and Captain Lewis W. Morse of the Library of the Judge Advocate General of the Army. The text of the resolution and a letter of acknowledgment from Dr. James follow.

AN APPRECIATION

Dear Dr. James:

It is with great pleasure that the American Association of Law Libraries, of which you are an honored past President, presents to you this tribute as an expression of the affection and esteem with which you are held by all its members, who, at the annual meeting in Milwaukee, on June 21-23 last, elected you an honorary life member.

You were born and reared in Kentucky and you have the graciousness and

charm granted to its favored sons. Your classical training leading to a Bachelor of Science degree and your legal training leading to a Bachelor of Laws from the University of Cincinnati and a Doctor of Juridical Science from Harvard University, were adequate preparation for your distinguished career. You were for nineteen years a successful practitioner, Professor of Law and Dean of the Law School at the University of Missouri, adviser on foreign affairs to the Siamese government for six years, Judge of its Supreme Court for five years, and its representative at the Permanent Arbitral Tribunal of The Hague. Twice you were decorated by that government and once by the government of Japan.

For the past eighteen years your talents have been largely devoted to the Harvard Law School, both as Professor of Law and as its distinguished Librarian, and under your dynamic leadership it has assembled the largest and most outstanding legal collection in America—a collection vastly enriched through the inclusion of numerous works of art and other treasures which are an integral part of our legal tradition.

But it is not for those reasons only that law librarians hold you in such high esteem. You have conceived your responsibility to the Harvard Law School as professor and librarian in broad terms —in terms of service to the legal profession, to the Association of American Law Schools and particularly to law librarians and their libraries wherever they are located. You have always been willing to render assistance to us individually, as many of us can testify, and, in addition, you have in one role or another continuously participated in the advancing program of the American Association of Law Libraries. It has asked you to do many things year after year and you have done them all efficiently. As President and as a member of its Executive Committee for several years, you worked loyally and effectively. You have been an active worker as a member of the Committee on the *Law Library Journal*, and a contributor to its pages. In 1925 you were the prime mover in reorganizing the *Index to Legal Periodicals* and have been its editor since then, guiding it through most difficult years, until your resignation on June 4, 1942. Under your direction its size and usefulness have been greatly increased until it now provides an indispensable bibliographical service, financially self-supporting. Your only reward is the knowledge of a work well done.

With all this in mind, we send you this appreciation and express the profound hope that your retirement as Professor of Law, as Librarian of the Harvard Law School and as Editor of the *Index to Legal Periodicals*, and your consequent preoccupation with other fields of endeavor will not altogether prevent a continuation of the collaboration which has meant so much to all of us and to our Association.

To Mrs. James we extend our affectionate regard and wish you both long life, health, prosperity and happiness.

American Association of Law Libraries

by Wm. S. Johnston
Wm. R. Roalfe
Bernita J. Long

DR. JAMES' LETTER

Mrs. Bernita J. Long
President, American Association of
Law Libraries
Law Library, University of Illinois
Urbana, Illinois

Dear Mrs. Long:

Last night at a delightful dinner, Miss Newman and Mr. Roalfe presented to Mrs. James and me the beautiful Appreciation, all too flattering, which the Committee of the Association prepared under your direction.

I am more than grateful for the kind, and, I fear, too generous, expressions of appreciation for the little I have been able to do for the Association and for law librarians generally. My taste for sweets has grown with the years and I am grateful to a degree that I cannot fully express.

The beauty of the illuminations, worthy of the fourteenth century, the binding and style of the text indicate that a very great artist (or artists) has been concerned in its design and execution.

I trust that you will convey to the Association my deepest gratitude for my election as an honorary life member and to you and to the other members of your Committee for the warm friendship shown in the expression of the sentiments of the Association.

Mrs. James, also, desires me to express her appreciation of the reference to her and joins me in thanking the Association and the Committee for the exquisite book and for what it contains.

I must add in all fairness a word or two. Whatever I may have done has been made possible only by the devoted and loyal assistance of the whole staff of the Harvard Law School Library, and as to the *Index*, particularly, of Robert Anderson and Jessie Wharton. Not many outside of the library know what Robert Anderson did in the solution of the many problems arising in connection with the *Index*. The Association owes him a debt of gratitude and I want to associate him with me in expressing my thanks for the beautiful book you have given me. His learning has been through the years at the service of the law librarians of the country. Though I signed most of the letters, the knowledge and the scholarship contained in them was generally that of Robert Anderson.

Also, whatever there is of greatness in the Harvard Law School Library, and I believe it is a great library, John Himes Arnold, who built it, and James Barr Ames and Roscoe Pound, who provided the funds and gave it the benefit of their devoted oversight, must never be forgotten.

My only regret is that Frank Poole and John Vance could not have been with us last night. They can never be replaced.

Again, Mrs. James and I thank you all from the depths of our hearts.

Yours sincerely,

ELDON R. JAMES

April 23, 1943.

CURRENT COMMENTS

Sidney B. Hill Appointed Librarian

SIDNEY B. HILL has been appointed Librarian and General Manager of the Association of the Bar of the City of New York to succeed Franklin O. Poole, who died recently after 40 years in that position. The announcement was made March 6 by Charles E. Hughes, Jr., Chairman of the Association's Executive Committee.

Mr. Hill has been Assistant Librarian of the Association since 1931 and was formerly an assistant in the Law Library of Congress. He was President of the American Association of Law Libraries last year.

Supplement to Check-List of Journals

THE NATIONAL ASSOCIATION OF STATE LIBRARIES, according to word from Dennis A. Dooley, President of the Association, is issuing a supplement to the *Check-List of Legislative Journals*. This will be printed in a separate pamphlet similar to the *Supplement to the Check-List of Session Laws*.

Book Available to Association Members

ALBERT S. OSBORN has authorized us to announce that a complimentary copy of his *The Mind of the Juror* will be sent to any library represented in the American Association of Law Libraries that does not have a copy. Requests should be addressed to the author at 233 Broadway, New York City.

Carolinas Chapter Meeting

MISS LUCILE ELLIOTT, Law Librarian of the University of North Carolina and President of the Carolinas Chapter, was hostess for the meeting at Chapel Hill, May 6. The effect of the war upon the libraries represented was discussed informally. Emphasis was placed upon the need for long-range planning and the preservation, as far as possible, of present staffs and facilities in order to be in readiness for the probable "boom period" of post-war days.

The Chapter is to discontinue meetings for the duration. The present officers are to be retained and all memberships will be continued.

Mr. William R. Roalfe, Law Librarian of Duke University, has been granted a leave of absence to assume a position with the OPA in Washington, D. C.

Miss Louise Bethea, Order Assistant at the Duke University Law Library, has resigned and has accepted a position in the library of the Naval Academy at Annapolis.

New Jersey Judicial Council Reports

MILES O. PRICE, Law Librarian of Columbia University, has been able to borrow the typewritten copies of the 11th and 12th New Jersey Judicial Council Reports and to obtain permission to make copies for the Columbia and other libraries. He is having them mimeographed at an estimated cost of forty cents for the two reports. He prefers payment in stamps with the order so as to avoid the expense of billing.

Service Notes

MILDRED L. DAGER, Assistant Librarian of the Department of Justice Library, is a lieutenant (j.g.) in the WAVES.

SAMUEL E. THORNE, U.S.N.R., has been promoted from the rank of lieutenant (j.g.) to lieutenant (s.g.). He is stationed in Washington, D. C.

LEWIS W. MORSE, Director of Libraries of the Office of the Judge Advocate General of the Army, has been advanced from the rank of captain to major. He is also in Washington.

Nominating Committee

LEWIS W. MORSE has been named chairman of the Nominating Committee. Other members are: Frances Farmer, Executive Secretary to the Law Library Committee, University of Virginia, Charlottesville; Harrison MacDonald, Law Librarian, Boston University; Francis X. Dwyer, Assistant Law Librarian of Congress; Margaret E. Hall, Reference Librarian, Columbia University Law School.

Moreland Appointed

CARROLL C. MORELAND has been appointed Assistant Librarian of the Association of the Bar of the City of New York. He was Law Librarian of the Michigan State Library.

CURRENT LEGAL PUBLICATIONS*

COMPILED BY LOUISE BETHEA
Duke University Law Library

Amadeo, Santos P. Argentine Constitutional law; the judicial function in the maintenance of the federal system and the preservation of individual rights. New York, Columbia Univ. Pr., 1943. 246p. $3. (Columbia Legal Studies, no. 4)

Babb, Hugh W., and Martin, Charles. An outline of business law. New York, Barnes & Noble, Inc., 1943. 385p. $1.25. (College Outline Series)

Barnes, Harry Elmer, and Teeters, Negley K. New horizons in criminology. New York, Prentice-Hall, Inc., 1943. $6.

Barry, Richard Hayes. Mr. Rutledge of South Carolina. New York, Duell, Sloan, and Pearce, Inc., 1942. 430p. $3.75.

Belcher, D. K. Griffith's Constitutional law and legal history. 3rd ed. London, Sweet & Maxwell, Ltd., 1943. 82p. 6s. (Questions and Answers Series)

Boorstin, Daniel J., ed. Delaware cases, 1792-1830. St. Paul, West Pub. Co., 1943. 3v. $30.

Brierly, J. L. Law of nations (Introduction to international law of peace). 3rd ed. London, Oxford University Press, 1943. 272p. 6s.

California Legal Record. Volumes I and II, 1878-1879. Buffalo, Dennis & Co., 1943. 2v. $75. (A photo reprint)

Clark, H. B. Biblical law. Portland, Oregon, Binfords & Mort, Publishers, 1943. 328p. $2.50.

Clarke, Dorris. The wayward minors' court; an evaluative review of procedures and purposes, 1936-1941. New York, The Magistrates' Court, 1942. 53p.

Commerce Clearing House. Dominion of Canada Income War Tax Act. Chicago, Commerce Clearing House, 1942. 170p. $1.

Commerce Clearing House. The tax law of the state of New York; as of July 1942. Chicago, Commerce Clearing House, 1942. 347p. $2.

Davar, S. R. Elements of Indian mercantile law. 9th ed. Bombay, Tripathi & Co., 1942. $4.50.

* A department of the LAW LIBRARY JOURNAL published, with the permission of William R. Roalfe, Law Librarian of Duke University, from data compiled by his staff members and listed in "Current Legal Publications," issued monthly in mimeographed form by the Duke University Law Library. The list printed above includes titles for the period April-May, 1943. Editor's note.

Davis, Elmer, and Price, Byron. War information and censorship. Washington, American Council on Public Affairs, 2153 Florida Ave., 1943. 79p. $1.

Domke, Martin. Trading with the enemy in world war II. N. Y., Central Bk. Co., 1943. $10.00.

Eby, Herbert O. The labor relations act in the courts. New York, Harper & Bros., 1943. 250p. $3.50.

Fins, Harry George. Illinois administrative procedure. Chicago, Current Law Pub. Co., 1942. 465p. $7.50.

Harley, David. Medico-legal blood group determination; theory, technique, practice. London, William Heinemann, Ltd., Medical Books, Ltd., 1943. 100p. 12s. 6d.

Higgins, A. Pearce. The international law of the sea. London, Longmans, Green & Co., 1943. 647p. 42s.

Illinois revised statutes 1943. The State Bar Assn., 1943. $7.50.

Jenkins, Arthur D. Illinois newspaper law. Mascoutah, Ill., Oxford Pub. House, 1942. 291p. $6.

Kisch, Guido. Jewry-law in central Europe—past and present. New York, The Author, 415 W. 115th St., 1943. 27p. $0.75. (Reprinted from Journal of Central European Affairs, v. 2. no. 4, Jan. 1943)

Kreml, Franklin M. The evidence handbook for police. Evanston, Ill., Northwestern Univ. Traffic Institute, 1827 Orrington Ave., 1943. 148p. $2.

National Association of Credit Men. Credit manual of commercial laws, 1943. War ed. New York, The Assn., 1942, 848p. $6.50.

National Probation Association. Delinquency and crime treatment in Nevada. New York, The Assn., 1790 Broadway, 1943. 75p. $0.50.

Newsom, G. H. Preston and Newsom's limitation of actions. 2nd ed. London, The Solicitors' Law Stationery Society, Ltd., 1943. 318p. £2.

Nussbaum, Arthur. Principles of private international law. New York, Oxford Univ. Pr., 1943. 288p. $3.50.

Palmer, Wm. J., editor-in-chief. California jury instructions civil. St. Paul, West Pub. Co., 1943. $12.

Potter, Harold. Historical introduction to English law and its institutions. 2nd ed. London, Sweet & Maxwell, Ltd., 1943. 588p. $6.

The Presidential executive orders, List and index of, numbered 1-8030, 1862-1938. New York, Archives Pub. Co., Hastings House, Announced. 2v. $12.50, pre-pub. $10. (complete guide to the 8500 numbered presidential executive orders issued prior to Jan. 1, 1939)

Rhyne, Charles S. Codification of municipal ordinances. Washington, National Institute of Municipal Law Officers, 730 Jackson Place, 1943. 43p. $2.

Schwarzenberger, G. International law and totalitarian lawlessness. London, Jonathan Cape, Ltd., 1943. 168p. $2.50.

Seltzer, C. Z. Equity trial practice and procedure. London, Fudge & Co., Mitre Press, 1943. $15.10.

Shaw, Francis A. A case book and treatise on interference. Muncie, Ind., Pioneer Pub. Co., 1943. 1000p. $10.

Sheedy, Anna T. Bartolus on social conditions in the fourteenth century. New York, Columbia University Pr., 1942. 267p. $3.25. (Columbia University Studies in History, Economics and Public Law, no. 495)

Strauss, Lillian L., and Rome, Edwin P. The child and the law in Pennsylvania. Philadelphia, Public Charities Assn. of Pennsylvania, 311 S. Juniper St., 1943. 300p. $2.25.

Tannan, M. L. Banking law and practice in India. 4th ed. Bombay, Butterworth & Co., Ltd., 1942. $5.25.

Teachers Union of the City of New York. Safeguard their future. New York, The Union, 13 Astor Place, 1943. 40p. $0.15. (Suggests rational approach to problems of juvenile delinquency in wartime)

Traver, Robert. Troubleshooter—The story of a northwoods prosecutor. New York, Viking Press, Inc., 1943. $2.75. (An account of the author's experiences)

Travers, Michael Arthur, and others. Business law and procedure. 1943 ed. New York, American Bk. Co., 1943. 650p. $1.88.

Tsiang, I-Mien. The question of expatriation in America prior to 1907. Baltimore, Johns Hopkins Pr., 1942. 128p. $2.25.

Vance, J. T. Background of Hispanic-American law. N. Y., Central Bk. Co., 1943. $6.50.

Wigmore, John H. Guide to America international law and practice. New York, Matthew Bender & Co., 1943. 493 p. $6.50.

Young, C. C., ed. The legislature of California. Its membership, procedure and work. San Francisco, Commonwealth Club of California, 1943. 350p. $3. (A factual study of the California legislature, together with the legislatures of other states)

CHECK LIST OF CURRENT AMERICAN STATE REPORTS, STATUTES[1] AND SESSION LAWS

Revised to May 15, 1943[2]

Publication	Dates of Regular Sessions	Source	Latest Vol. to Appear
ALABAMA			
Reports	. . .	West Pub. Co.	242
App. Reports	. . .	West Pub. Co.	29
Session laws	Quadrennial	Secretary of State	1939 Reg. & Ex.
Code, Compilation or Revision		Secretary of State	1940 Code A. 10v. with 1941 P. P.
ALASKA			
Reports	. . .	West Pub. Co.	9
Session laws	Odd years	Secretary of Territory	1941
Code, Compilation or Revision		Auditor of Alaska, Juneau	Comp. L. 1933 1v.
ARIZONA			
Reports	. . .	Bancroft, Whitney & Co.	58
Session laws	Odd years	Secretary of State	**Reg. 1941, 1st Spec. 1940 1 vol.**
Code, Compilation or Revision		Bobbs-Merrill Co.	1939 Code A. 6v. with 1941 P. P.
ARKANSAS			
Reports	. . .	Secretary of State	203
Session laws	Odd years	Secretary of State	Reg. 1941, Ex. **1939**
Code, Compilation or Revision		Department of State, Little Rock	Pope's Digest 1937 A. 2v.
		Thomas Law Book Co.	1942 Cum. A. Supp.
CALIFORNIA			
Reports	. . .	Bancroft-Whitney & Co.	20 (2d)
App. Reports	. . .	Bancroft-Whitney & Co.	54 (2d)
Advance Parts	. . .	Recorder Prtg. & Pub. Co.	Weekly
Session laws	Odd years	Secretary of State	1941, incl. 1940 Extra Sessions.
Code, Compilation or Revision		Bancroft-Whitney & Co.	
		1941 Deering Civil Code 1v.	1937 Deering General Laws 2v.
		1941 Deering Civil Procedure & Probate Code 1v.	1937 Deering Constitution 1v.
		1941 Deering Penal Code 1v.	1939 Supp. to Codes & General Laws 1v.
		1937 Deering Political Code 1v.	1941 Supp. to Constitution, Codes & General Laws 1v.
		1937-1939 Deering Commissioners' Codes, 3v.	

[1] In response to suggestions from members of the A.A.L.L., the Editor has revised this Check List to include Statutory Compilations. Because of space limitations only one is listed for each state with the official set listed in preference to unofficial sets. The Editor will be glad to receive additional suggestions from members and subscribers concerning these statutory listings.

[2] With acknowledgments to the N. A. Phemister Company.

Publication	Dates of Regular Sessions	Source	Latest Vol. to Appear
CANAL ZONE			
Reports	. . .	Executive Secretary, Panama Canal, Balboa Heights, C. Z.	3
Code, Compilation or Revision		Superintendent of Documents, Washington, D. C.	1934 Code A. 1v.
		The Chief of Office, The Panama Canal, Washington	Supp. No. 1, 1938
COLORADO			
Reports	. . .	A. B. Hirshfield Press, Denver, Colo.	109
Session laws	Odd years	Secretary of State	Reg. 1941
Code, Compilation or Revision		Michie Co.	1935 Stat. 5v. 1941 Replacement v. 1 with 1942 P. P.
CONNECTICUT			
Reports	. . .	E. E. Dissell & Co., Hartford, Conn.	128
*Advance Parts	. . .	E. E. Dissell & Co., Hartford, Conn.	
Conn. Supp.	. . .	Connecticut Law Journal Pub. Co.	10
Superior Ct. Rep.	. . .	Bridgeport, Conn.	
Common Pleas Rep.	. . .	(Selected cases by Judges)	
*Conn. Law Journal	. . .	Weekly continuations	
Session laws	Odd years	State Librarian	1941
Code, Compilation or Revision		E. E. Dissell & Co., Hartford, Conn.	1930 Gen. Stat. 3v. 1931-33-35 Cum. Supp. 1v. 1937-39 Cum. Supp. 1v. 1941 Supp. 1v.
DELAWARE			
Reports	. . .	State Librarian	41
Chancery reports	. . .	State Librarian	22
Session laws	Odd years	State Librarian	1941
Code, Compilation or Revision		Delaware State Library, Dover, Del.	1935 Code 1v.
DISTRICT OF COLUMBIA			
Appeals	. . .	West Pub. Co.	75
Acts Affecting District of Columbia	. . .	John Byrne & Co.	42
Code, Compilation or Revision		Government Printing Office, Washington, D. C.	1940 Code A. 2v.
FLORIDA			
Reports	. . .	E. O. Painter Ptg. Co., De Land	149
Session laws	Odd years	Secretary of State	1941 Gen. & Spec.
Code, Compilation or Revision		Secretary of State	1941 Stat. 2v.
GEORGIA			
Reports	. . .	The Harrison Co.	194
App. Reports	. . .	The Harrison Co.	67
Session laws	Odd years	State Librarian	1941
Code, Compilation or Revision		The Harrison Co.	1933 Code 1v.
HAWAII			
Reports	. . .	Clerk of Supreme Court	35
*Advance parts	. . .	Clerk of Supreme Court	
Session laws	Odd years	Secretary of Territory	1941; 1941 Spec.
Code, Compilation or Revision		Secretary of Territory	1935 L. 1v.

* Advance parts paged to correspond with permanent edition.

Publication	Dates of Regular Sessions	Source	Latest Vol. to Appear
IDAHO			
Reports	. . .	Bancroft, Whitney & Co.	62
Session laws	Odd years	Capital News Pub. Co.	Reg. 1941
Code, Compilation or Revision		Bobbs-Merrill Co.	1932 Code 4v.
		Courtright Pub. Co., Denver	1940 Supp. 1v.
ILLINOIS			
Reports	. . .	Edwin H. Cooke, Bloomington	380
*Advance parts	. . .	Edwin H. Cooke, Bloomington	
App. Reports	. . .	Callaghan & Co.	316
*Advance parts	. . .	Callaghan & Co.	
Court of Claims Reports	. . .	State Printer	11
Session laws	Odd years	Secretary of State	1941 2v.; 1941 Spec. in Sen. & H. J.
Code, Compilation or Revision		The Burdette Smith Co.	1943 Stat. 1v. State Bar Ed.
INDIANA			
Reports	. . .	Secretary of State	219
App. Reports	. . .	Secretary of State	109
Session laws	Odd years	Secretary of State	1941
Code, Compilation or Revision		Bobbs-Merrill Co.	1933 Burns' Stat. A. 12v. Replacements v. 4, 8; 1942 P. P.
IOWA			
Reports	. . .	Superintendent of Printing	231
Session laws	Odd years	Superintendent of Printing	Reg. 1941
Code, Compilation or Revision		Superintendent of Printing	1939 Code 1v.
KANSAS			
Reports	. . .	State Librarian	154
*Advance parts	. . .	State Librarian	
Session laws	Odd years	Secretary of State	Reg. 1941
Code, Compilation or Revision		Secretary of State	1935 Gen. Stat. A. 1v. 1941 Supp. 1v.
KENTUCKY			
Reports	. . .	State Librarian	290
*Advance parts	. . .	State Librarian	
Session laws	Even years	State Librarian	1942, 1942 Ex. in 1v.
Code, Compilation or Revision		Statute Revision Commission	1942 Rev. Stat. 2v. (Vol. 2 in preparation)
LOUISIANA			
Reports	. . .	West Pub. Co.	200
Session laws	Even years	Secretary of State	1942, 1942 Ex. in 1v.; Crim. Code 1v.
Code, Compilation or Revision		Bobbs-Merrill Co.	1939 Gen. Stat. 6v. with 1942 P. P.
MAINE			
Reports	. . .	Southward Anthoenson Press, Portland	137
Session laws	Odd years	Book Dealers in Portland and Bangor	Reg. 1941, incl. 1940 Spec. Sess.; 1942 Spec. Sess.
Code, Compilation or Revision		Department of State	1930 Stat. 1v.
MARYLAND			
Reports	. . .	Century Printing Co., Baltimore	180
*Advance parts	. . .	Century Printing Co., Baltimore	
Baltimore City Reports	. . .	Daily Record Pub. Co., Baltimore	v. 4 (1919-1928)
Session laws	Odd years	State Librarian	Reg. 1941
Code, Compilation or Revision		Dept. of Leg. Ref., Baltimore	1939 Code A. 2v.

* Advance parts paged to correspond with permanent edition.

Publication	Dates of Regular Sessions	Source	Latest Vol. to Appear
		MASSACHUSETTS	
Reports	. . .	Wright & Potter Ptg. Co., Boston	311
Advance parts	. . .	Wright & Potter Ptg. Co., Boston	
App. Div. Reports	. . .	Lawyers' Brief & Pub. Co., Boston	7
Session laws	Odd years	Secretary of the Commonwealth	1941, 1942 Spec. in 1v.
Code, Compilation or Revision		Department of Secretary	1932 Gen. L. 3v.
		MICHIGAN	
Reports	. . .	Callaghan & Co.	302
*Advance parts	. . .	Callaghan & Co.	
Session laws	Odd years	Secretary of State	1941; 1942 2 Ex. in 1v.
Code, Compilation or Revision		Secretary of State	1929 Com. L. 4v.
		Mason Pub. Co.	1940 Cum. Supp. A. 1v.
		Mason Pub. Co.	1942 Supp. 1v.
		MINNESOTA	
Reports	. . .	Johnson Pub. Co., St. Paul	212
Session laws	Odd years	Secretary of State	Reg. 1941
Code, Compilation or Revision		Comr. of Administration, St. Paul	1942 Stat. 2v.
		MISSISSIPPI	
Reports	. . .	E. W. Stephens Pub. Co., Columbia, Mo.	192
Session laws	Even years	Secretary of State	1942 Gen. & Loc.
Code, Compilation or Revision		Harrison Company	1930 Code A. 2v. 1938 Cum. Supp. 1v.
		MISSOURI	
Reports	. . .	E. W. Stephens Pub. Co., Columbia	349
App. Reports	. . .	E. W. Stephens Pub. Co., Columbia	235
Session laws	Odd years	Secretary of State	1941; 1942 Ex.
Code, Compilation or Revision		Secretary of State	1939 Rev. Stat. 3v. Supp. 1941
		MONTANA	
Reports	. . .	Bancroft, Whitney & Co.	112
Session laws	Odd years	State Publishing Co., Helena	Reg. 1941
Code, Compilation or Revision		State Publishing Co., Helena	1935 Code A. 5v.
		Courtright Pub. Co.	1939 Supp. A. 1v.
		NEBRASKA	
Reports	. . .	State Librarian	141
Session laws	Odd years	State Librarian	1941
Code, Compilation or Revision		Department of State	1929 Com. Stat. A. 1v.
		Supplement Printing Co., Lincoln	1941 Supp. 1v.
		NEVADA	
Reports	. . .	Secretary of State	60
Session laws	Odd years	Secretary of State	Reg. 1941
Code, Compilation or Revision		Bender-Moss Co., San Francisco	1929 Com. L. A. 6v. with 1931-41 Cum. Supp., 2v.
		NEW HAMPSHIRE	
Reports	. . .	C. D. Hening, Lancaster, N. H., Reporter	91
*Advance parts	. . .	C. D. Hening, Lancaster, N. H.	
Session laws	Odd years	Secretary of State	1941
Code, Compilation or Revision		Secretary of State	1942 Rev. L. 3v.

* Advance parts paged to correspond with permanent edition.

Publication	Dates of Regular Sessions	Source	Latest Vol. to Appear
		NEW JERSEY	
Law Reports	. . .	Soney & Sage Co.	127
Equity Reports	. . .	Soney & Sage Co.	131
Miscellaneous Reports	. . .	Soney & Sage Co.	20
Advance parts covering above	. . .	Soney & Sage Co.	
Session laws	Annual	Secretary of State	1942
Code, Compilation or Revision		Department of State	1937 Rev. Stat. 5v.
		Gann Pub. Co.	1938-39-40 Cum. Supp. 1v.; 1941-42 Cum. Supp. 1v.
		NEW MEXICO	
Reports	. . .	West Pub. Co.	46
Session laws	Odd years	Secretary of State	Spec. 1940, Reg. 1941
Code, Compilation or Revision		Bobbs-Merrill	1942 Stat. A. 6v.
		NEW YORK	
Reports	. . .	Williams Press, Inc., Albany	288
App. Div. Reports	. . .	Williams Press, Inc., Albany	264
N. Y. Miscellaneous	. . .	Williams Press, Inc., Albany	177
*Advance parts covering all the above	. . .	Williams Press, Inc., Albany	
State Department Reports	. . .	Publishers Ptg. Co., 207 W. 25th St., N. Y. City**	64
N. Y. State Labor Relations Board decisions	. . .	N. Y. Industrial Commissioner, 80 Centre St., N. Y. C.	4
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